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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

DANIEL B. CROWDER, individually and as President of the West Virginia Northern Community College, GREGORY D. ADKINS, individually and as Dean of Academic Affairs of West Virginia Northern Community College, and THE WEST VIRGINIA BOARD OF REGENTS, a corporation,

Petitioners,

v.

E. JEAN ORR,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

---

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## QUESTIONS PRESENTED

1. Whether a state-college librarian's criticism of the planned location of a new library facility constituted protected speech relating to a matter of public concern so as to be an impermissible basis on which to terminate her probationary employment, where such criticism was communicated to her superiors and co-employees in a manner at variance with her superiors' expectations of her regarding tact and protocol, which manner exemplified a continuing pattern of unresponsiveness to her superiors.

2. Whether the librarian's persistent efforts to convince her superiors that she ought to be granted retroactive faculty-status constituted

speech relating to a matter of public concern so as to be an impermissible basis on which to terminate her employment, where such termination was based in part on a continuing pattern of unresponsiveness to her superiors exemplified by the manner in which she sought retroactive faculty-status.

3. Whether the court below denied petitioners due process of law by sua sponte overruling state procedural law and retroactively applying a requirement that trial counsel must request a separate verdict on each count to preserve any error in the submission of bad counts to the jury, where petitioners' trial counsel, relying on the law in effect at the time of trial, did not so request, and would have prevailed

on appeal but for the retroactive application of the new rule.

4. Whether the federal rule, requiring a general jury verdict in favor of plaintiff to be set aside when it cannot be concluded that the verdict was not based on a theory erroneously submitted, should be applied to a 42 U.S.C. § 1983 action prosecuted in state court where the contrary state rule is outcome-determinative in a systematic manner.

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THE OPINION BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at 315 S.E.2d 593, and is reproduced as Appendix A herein. The trial court entered judgments in favor of respondent for damages and attorneys fees but issued no opinion.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was issued by the Supreme Court of Appeals of West Virginia on December 16, 1983. A timely Petition for Rehearing was denied on January 31, 1984 (Appendix C). On April 11, 1984, this Court granted petitioners' application to extend the time for filing a petition for certiorari to and including June 29, 1984 (Appendix D). The jurisdiction of this Court is invoked pursuant to 28

U.S.C. § 1257(3), which provides for review by certiorari of judgments of the states' highest courts.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I, Constitution of the United States, provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV, Constitution of the United States provides, in pertinent part:

"No state shall \* \* \* deprive any person of life, liberty, or property without due process of law."

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

W. Va. Code § 56-6-26, as amended in 1923, provides:

"When there are several counts in a declaration, one or more of which are faulty, the defendant may demur to the faulty count or counts, or

move the court to instruct the jury to disregard them. If he does neither, and entire damages be found, judgment shall be entered against the defendant for the damages found, if any count be good, although others be faulty, unless the court can plainly see that the verdict could not have been found on the good count. If he demurs to the faulty count, or moves the court to instruct the jury to disregard it, and his demurrer or motion is overruled, and entire damages be found, and it cannot be seen on which count the verdict was founded, if the jury has been discharged the verdict shall be set aside, but if it is manifest that the verdict could not have been found on the bad count, the verdict shall be allowed to stand. If the jury has not been discharged, the court shall send it back with instructions to designate on which count of the declaration its verdict is found."

Prior to its amendment in 1923, W.  
Va. Code § 56-6-26 provided:

"When there are several counts, one of which is faulty, the defendant may ask the court to instruct the jury to disregard it, yet if entire damages be given, the verdict shall be good."

#### STATEMENT OF THE CASE

Petitioners were the defendants in an action for damages brought by respondent Jean Orr in the Circuit Court of Kanawha County, West Virginia, pursuant to 42 U.S.C. § 1983. She alleged that her probationary employment as head librarian of West Virginia Northern Community College was terminated by petitioners Crowder and Adkins without affording her procedural due process and as retaliation for her exercise of free speech. Petitioner Crowder was president of the college. Petitioner Adkins

was Dean of Academic Affairs and as such was Mrs. Orr's immediate superior. Petitioner, the West Virginia Board of Regents, was (and is) the State agency that governs State-operated colleges and universities, including West Virginia Northern Community College.

#### Pertinent Procedural History

At the trial in 1980, the case was submitted to a jury on both claims alleged in the complaint--denial of due process and retaliation for free speech. The trial court denied defense counsel's request to submit special interrogatories to the jury calculated to disclose the jury's findings-of fact, and the jury returned a general verdict in favor of Mrs. Orr without specifying the theory or theories on which it relied (Appendix B, p. 7). The circuit court

entered a judgment for damages of Twenty-six Thousand Dollars (\$26,000.00) in favor of Mrs. Orr and against petitioners Adkins and Crowder and awarded her attorneys fees against the West Virginia Board of Regents. Petitioners timely appealed to the West Virginia Supreme Court of Appeals which affirmed the judgment (Appendix A, pp. 7, 69). Petitioners seek review by certiorari of that affirmance.

The greatest bulk of the evidence, argument, and jury instructions presented at trial concerned respondent's due process claim. The opinion below held that the due process claim should not have been submitted to the jury in light of Mrs. Orr's failure to prove a legitimate expectation of continued employment, but further held that one of

her two free-speech theories was properly submitted (Appendix A, pp. 15-43). (The opinion ignores the second free-speech theory, which was founded on a personal dispute between Mrs. Orr and her superiors concerning her credit towards tenure.)

Though the general verdict was clearly tainted by the substantial probability that it was based on the improperly submitted claim, the court below formulated a rule new to West Virginia jurisprudence that nevertheless permitted affirmance. The so-called "two-issue" rule, expounded in the opinion below, provides that a general verdict will be affirmed if both proper and improper claims were submitted to the jury, unless defense counsel at trial requested separate verdicts as to

each claim (Appendix A, pp. 43-53). None of the parties to the appeal raised or briefed this rule, a rule which overruled by implication existing state law that such verdicts be set aside. Relying on existing law, petitioners' counsel below did not object to the form of the general verdict (Appendix B, pp. 2,7).

Petitioners timely filed a Petition for Rehearing founded primarily on the court's retroactive and sua sponte application of the "two-issue" rule to petitioner's circumstances. The Petition for Rehearing was summarily denied without an opinion (Appendix C).

The Claims Presented to the Jury Below

Mrs. Orr was appointed to the position of head librarian of the Wheeling campus of the College on July 1, 1971.

Until her final year, 1976-1977, she had administrative responsibilities for libraries on two branch campuses as well. As an administrator, she was appointed on a year-to-year basis at the will and pleasure of President Crowder. In April of 1976, President Crowder granted Mrs. Orr "faculty status" retroactive to July 1, 1974, making her a probationary faculty member employed on a year-to-year basis. On June 23, 1976, President Crowder notified her that her "1976-1977 annual probationary contract will be a terminal contract with the College." Applicable policies of the Board of Regents stated that no reasons needed to be given for such "nonreappointments," and none were.

### 1. Respondent's Due Process Claims

Mrs. Orr's complaint alleged that President Crowder had orally promised her faculty status retroactive to July 1, 1971, which would have made her in 1975-1976 a faculty member in her last year of probationary status, a status recognized as conferring a sufficient expectation of continued employment to trigger due process rights. State ex rel. McLendon v. Morton, \_\_\_ W. Va. \_\_\_, 249 S.E.2d 919 (1978).

By far the bulk of the evidence at trial was directed at the question of whether President Crowder should have exercised his discretion to give Mrs. Orr fully retroactive faculty status. However, applicable policy placed no limitations or standards on his

discretion, and he awarded faculty status back to 1974 only.

In addition to her alleged right to retroactive faculty status, Mrs. Orr alleged that institutional policies entitled her, as a faculty member, to annual evaluations by another faculty member and to pursue a grievance of the President's decision not to reappoint her. Substantial testimony was directed at the issues of whether these alleged policies existed and whether they were applicable to Mrs. Orr's circumstances. The jury was instructed, over appropriate objections, that if such policies existed, they constituted "entitlements"; and that the denial, if any, of either of such "entitlements" would render her non-reappointment a deprivation of property without due process.

At the close of the evidence, defense counsel made a motion for a directed verdict in favor of the petitioners grounded on respondent's failure to prove any protected property interest, but the motion was denied and the due process issues were submitted to the jury. On appeal, the West Virginia Supreme Court of Appeals held that the motion for directed verdict should have been granted but nevertheless affirmed the general verdict by retroactively applying the "two-issue" rule newly expounded in the opinion.

2. Respondent's First Amendment Claims.

Mrs. Orr's complaint additionally alleged that the decision not to reappoint her was in retaliation for (1) her disagreement with petitioners Adkins and

Crowder concerning her retroactive faculty status and (2) her criticism of the planned location of a new college library to be placed on the ground floor of the "B & O Building" in Wheeling, West Virginia.

President Crowder and Dean Adkins testified that their decision not to reappoint her was based on her poor performance. Several defense witnesses testified to weaknesses in her performance and to unresponsiveness to her superiors. She inappropriately considered herself autonomous and was unproductive and undiplomatic. The evidence presented on behalf of Mrs. Orr did little to rebut these witnesses, and her counsel opined at trial that her performance was irrelevant.

Much of the evidence presented on behalf of Mrs. Orr detailed events that she relied on to advocate to her superiors that her faculty status should be retroactive to 1971. She continued her advocacy after the decision was made to make such status nonretroactive, and sent a memo detailing her expectations regarding faculty status to the Faculty Senate Executive Committee, a body with no administrative authority concerning the issue. Dean Adkins was critical of her for thus taking the controversy outside the chain of command without first discussing it with him. After investigating her claims, however, Dean Adkins recommended in February of 1976 that faculty status be retroactive to July 1, 1974. Mrs. Orr pursued a

grievance complaining of that decision as well.

In March of 1976, Dean Adkins wrote an evaluation of Mrs. Orr criticizing her handling of several matters, including the faculty status issue:

"In summary, Mrs. Orr appears to pursue her viewpoint to almost any length in order to prevail. It has fallen my sad duty to inform her orally and now in writing of matters which others seem reluctant, or possibly afraid, to impart to her. In my judgment, I strongly suspect that her temperament, lack of general understanding, and execution of administrative protocol and diplomacy may preclude her from effective service in her present responsibilities."

On April 1, 1976, he recommended to President Crowder that she not be retained beyond the 1976-1977 school year. President Crowder adopted his recommendation on June 23, 1976.

A relatively small portion of respondent's evidence at trial related to her criticism of the location of the planned new library, yet this is the sole theory on which the general verdict was eventually affirmed. Mrs. Orr testified that early in October, 1975, Dr. Adkins showed her plans developed by a Board of Regents architect for renovating the "B & O Building" to house the Wheeling Campus, including Mrs. Orr's library. She immediately saw problems in the plans in that the main entrance to the building opened into the library, and corridors to classrooms ran through the library, threatening the security of the collection. She brought these problems to Dr. Adkins' attention at that time and in conversations over the next few days. He indicated he would

take them up with President Crowder. She suggested that the Learning Resources Committee, of which she was a member, should meet "because I knew they could get things done." However, Dean Adkins instructed her not to do so and to keep the plans secret.

On October 10, 1975, at a general faculty meeting attended by Mrs. Orr, the "secret" plans were discussed, and Mrs. Orr stated she had no part in the preparation of the plans for the library. (There was no indication in the record that Mrs. Orr initiated the discussion at the faculty meeting.) Mrs. Orr agreed at the meeting to be a part of a committee consisting of each division chairperson to present perceived problems to President Crowder. The next day Dean Adkins "came up to me

very angrily and began almost literally slashing at me verbally as to something about the plans for the B & O Building," but she was unable to ascertain what he was talking about.

On October 14, President Crowder and Dean Adkins met with the developer of the plan and the Division chairpersons, including Mrs. Orr. She had prepared "questions I might raise about the problems of the building," and when she began asking them, Dr. Crowder criticized her for "raising these problems now," saying, "You've had plenty of chance for input." She denied having any input and testified that Dean Adkins said angrily, "You've had plenty of input" and that he criticized her for not calling her committee to meet.

When she returned to her office, Dean Adkins called her and was "very pleasant." He acknowledged that he had told her not to call a Learning Resources Committee meeting and authorized her to go ahead and have the committee come up with recommended changes. On October 17, Dean Adkins told her the changes were accepted and would be effected.

On October 23, Mrs. Orr received Dean Adkins' memo authorizing nonretroactive faculty status, effective July 1, 1975. She testified that the timing of that memo led her to believe it was in retaliation for criticism of the B & O plans "and because I caused embarrassment." However, there was no indication in the record that Dean Adkins or President Crowder disagreed with Mrs.

Orr's assessment of the plans, and Crowder testified that everybody concerned there were significant problems with the plans.

The dissenting opinion below explicitly recognized that the respondent's evidence showed only that the petitioners were irritated with respondent's lack of administrative tact and protocol (Appendix A, pp. 71, 73, 74). The majority opinion does not discuss whether petitioners were motivated by the content of the criticisms rather than their form and context.

#### How the Issues Were Raised Below

The issue of whether respondent's statements constituted a matter of public concern (Questions 1 and 2) was raised in the trial court by submitting to the court a written "Proposed

Question of Law" as to "whether plaintiff's speech was 'protected' speech within the meaning of the First Amendment to the United States Constitution?" Petitioners' submission asserted that this was an issue for the court, not the jury. The trial court, by implication, found that the speech in issue presented a jury issue by submitting the claim to the jury, together with an instruction that "free speech does not include bickering and running disputes with department heads or superiors." The issue was better refined in the Brief for Appellants filed on July 1, 1983, before the Supreme Court of Appeals subsequent to this court's decision in Connick v. Myers, \_\_\_ U.S. \_\_\_, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), wherein Connick was discussed at length.

(Prior to Connick, the parties attached less significance to the effect of the form and context of respondent's speech on the issue of "public concern.") The issue was addressed on the merits with respect to the library in both the majority and dissenting opinions below, but the dispute regarding retroactive tenure was ignored (Appendix A, pp. 71-73, 84-85). The issue was again raised in the Petition for Rehearing with respect to the library only.

The issue of whether federal law should have been applied to determine the effect of a general verdict based on good and bad counts (Question 4) was clearly presented in the petitioners' Petition for Rehearing timely filed with the Supreme Court of Appeals subsequent

to the opinion below. Because prevailing state law was overruled sua sponte by the opinion below to the detriment of petitioners, this issue was timely raised. Brinkerhoff-Faris Trust and Sav. Co. v. Hill, 281 U.S. 673 (1930).

The issue of whether petitioners were denied due process by the State court's retroactive application of the "two-issue" rule (Question 3) was raised in the aforementioned Petition for Rehearing, wherein State decisions regarding deprivations of vested rights were relied upon, which decisions relied in whole or in part on the Due Process Clause of the United States Constitution. A written motion to permit oral argument in support of the Petition for Rehearing, and the oral argument itself,

specifically argued that petitioners' were denied due process of law by retroactive application of the "two-issue" rule. The issue was timely raised per Brinkerhoff-Faris Trust and Sav. Co. v. Hill, supra.

The aforesaid Petition for Rehearing was denied without any opinion (Appendix C).

#### REASONS FOR GRANTING THE PETITION

##### I.

THE OPINION BELOW CONFLICTS WITH CONNICK V. MYERS, U.S. \_\_\_, 103 S.C.T. 1684, \_\_\_ L. ED. 2d 708 (1983), BY HOLDING THAT RESPONDENT'S DISPUTES AND CRITICISMS WERE MATTERS OF PUBLIC CONCERN.

Connick v. Myers was quoted at length and relied upon by petitioners in their briefs before the court below, but the majority opinion ignores Connick, and does not even cite the case in its

discussion of whether appellant's speech was protected (Appendix A, pp. 84-85).

The Assistant District Attorney dismissed in Connick v. Myers was upset with her superiors' regarding several matters and distributed a questionnaire to other assistants to obtain their views and support. She was motivated by her perception that her superiors were unresponsive to her concerns. The District Attorney considered her questionnaire to be disruptive and insubordinate and he dismissed her.

This Court held that the determination of whether her questionnaire constituted protected speech depended not only on its content (which admittedly touch on matters of tangential interest to the public) but also on its "form and context." The Court also held

that it was not constrained by the lower court's interpretation of the record, since the protected status of speech is an issue of law, not of fact.

The "form and context" of Mrs. Orr's activities indicated that she, like Myers, was upset with her superiors' supposed unresponsiveness to several matters and was thus motivated to bypass the chain of command and utilize extraordinary means to press her views. Dean Adkins' decision to recommend her termination was clearly motivated by this kind of behavior.

Respondent's dissatisfaction with petitioners' decision regarding her retroactive tenure-status was taken to the Faculty Senate Executive Committee, a body with no authority over President Crowder, in an apparent attempt to

elicit support or to gain an advantage. Only after this effort failed did she utilize the established institutional grievance procedure. Dean Adkins was critical of her for her involvement of the Executive Committee, and by memo immediately asked her to explain why she did so and what she considered to be proper channels for employee grievances. Her reply indicated she understood that a grievance should be processed through the chain of command.

The opinion below does not even acknowledge this First Amendment claim, but it was the subject of considerable evidence and controversy below. By ignoring this claim and retroactively applying the "two issue" rule, the court below has artificially insulated its opinion from meaningful review. (See

Argument III, infra.) The facts heretofore summarized in this section are so analogous to Connick v. Myers, supra, that it is apparent this claim should never have been submitted to the jury, and it is not at all clear that the jury's general verdict was not influenced by this claim.

Mrs. Orr had been directed to maintain secrecy regarding the library plans, but she nevertheless participated in a discussion of them at a general faculty meeting a few days later and agreed to be part of an ad hoc committee to take their concerns directly to President Crowder. Relatively little evidence was introduced by any party concerning these activities, but the record is sufficient to validly conclude, as did the dissenter below, that

her activities were personally motivated and were a breach of protocol; and that petitioners' adverse reactions (if any) were based on the "form and context" of her statements, not their content.

Mrs. Orr's tenure dispute and her library criticisms were not censured for their content, but because they were examples of a continuing pattern that led Dr. Adkins to conclude, in his next evaluation of her, that she inappropriately "pursues her viewpoint to almost any length in order to prevail.

\* \* \* I strongly suspect that her temperament, lack of understanding and execution of administrative protocol and diplomacy may preclude her from effective service in her present responsibilities."

II.

REVIEW OF THE DECISION BELOW WILL CLARIFY WHETHER ADVERSE ACTION BY AN EMPLOYER MOTIVATED BY CRITICISM, BUT BASED ON LEGITIMATE FACTORS OTHER THAN THE CONTENT OF THE CRITICISM, ARE PERMISSIBLE.

The record below strongly supports the perceptions of the dissenting opinion that Mrs. Orr's termination was based on her inability to handle administrative problems tactfully and in accordance with reasonable administrative protocol. Dean Adkins' alleged expressions of anger towards her regarding the planned library did not react to the content of her criticisms and took place immediately after her violations of protocol. Dr. Crowder's criticism of her for rehashing her concerns at his meeting with the ad hoc committee were apparently based on the

fact that she had already utilized her opportunity to provide input through the ordinary chain of command and need not continue to pursue her concerns.

Unlike prior decisions of this Court, the facts of this case present an excellent opportunity to assess the distinction between employer reactions motivated by a desire to suppress the expression of dissent from reactions motivated by factors unrelated to the content of the allegedly protected speech. The majority opinion below does not attempt to distinguish the manner and context of Mrs. Orr's criticisms from their content, and is thus subject to a probing review in light of facts ignored by the majority which are clearly relevant under Connick v. Myers,

— U. S. \_\_\_, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

The opinions of this Court have tantalizingly approached the concept that the mode, manner and circumstances of an expression may influence the determination of whether it was protected speech on a matter of public concern, but some apparent contradictions need clarification. Girhan v. Western Line Consolidated School District, 439 U.S. 410 (1970), quite simply held that protected speech is no less protected when it occurs in private with the employer as when it occurs in a more public arena. But Connick v. Myers traces the roots of First Amendment protection as redressing attempts by government "to suppress the rights of public employees to participate in

public affairs." 75 L. Ed. 2d at 718. (Emphasis supplied.) The fact that Myers' criticisms of office policy included some matters of tangential public concern was outweighed by her apparent selfish motivation and her potential for disrupting Connicks' authority. That the critical questionnaire was distributed only within the office was corroborative of this Court's conclusion that she spoke "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."

Thus, it appears that protected speech is protected wherever uttered, but the forum in which it is uttered may influence the decision as to whether it is protected at all. This is supported by the language in Connick v. Myers,

supra, that "whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." Id. at 720.

The concept expressed in Pickering v. Board of Education, 391 U.S. 563 (1968), that the values of the First Amendment must be balanced against the State's interest in the orderly operation of its affairs, implied that a more disruptive mode of expression may be less protected than one following traditional protocol. This concept is exemplified by Bowman v. Pulaski County Special School Dist., 723 F.2d 640 (8th Cir. 1983), and Janusaitis v. Middlebury Volunteer Fire, etc., 607 F.2d 17 (2nd Cir. 1979), wherein the

demeanor of the plaintiffs was assessed in making determinations as to violations of their right to free speech.

Connick recognizes this implication and has accordingly been criticized as permitting courts to utilize unnecessarily subjective standards in determining whether speech is protected.

"The Court has also imposed subjective standards requiring evaluation of the public interest in an employees' speech and weighing of the subjective perceptions of harm by government managers. This is a far cry from weighing concrete evidence of harm to the government against the infringement of an individual's rights. The Myers standard will prove difficult for the courts to wrestle with and will be harmful to the individual rights of public employees." 30 Fed. Bar News and Journal 390 at 394.

By reviewing the proceedings below, this Court can add definition to standards perceived by some as unworkable, by adding definition to the distinction between the content of the speech and the manner and place of its utterance. This would not relieve the courts of the burden of reviewing each case on a case-by-case basis, but would lead to greater predictability, and would be of benefit to both the public employee and the employer.

### III.

RETROACTIVE APPLICATION OF THE "TWO-ISSUE" RULE TO PETITIONERS DEPRIVED THEM OF PROPERTY WITHOUT DUE PROCESS OF LAW, WAS CONTRARY TO BRINCKERHOFF-FARIS TRUST AND SAV. CO. V. HILL, 281 U.S. 673 (1930), AND WAS SO ARBITRARY AS TO REQUIRE INTERVENTION BY THIS COURT.

At the trial of this matter in 1980, five factual theories were submitted to the jury, three of which were predicated upon due process, two upon freedom of speech. The trial court denied defense counsel's request for submission of special interrogatories to the jury calculated to determine the basis of the general verdict (Appendix B). It also denied defense counsel's motions for a directed verdict grounded on respondent's failure to prove a

legitimate expectation of continued employment.

Existing statutory law at the time of the trial and appeal of the instant case required that a general verdict rendered upon two or more counts, one of which was faulty, be set aside unless it was clear that the verdict was not based upon the bad count. W. Va. Code § 56-6-26. Though the State's Rules of Civil Procedure supercede conflicting procedural statutes, the State rules do not address this problem. The common law in both State and federal jurisprudence would set aside such general verdicts absent unusual circumstances.

Freeman v. Monongahela Valley Traction Company, 98 W. Va. 311, 128 S.E. 129 (1924); Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,

270 U.S. 19 (1962). Accordingly, counsel below did not object to the form of the general verdict. Had he done so, he would have lost the advantage, under existing law, of securing a reversal if any one of the five theories were improperly submitted.

The Supreme Court of Appeals held that Mrs. Orr failed to establish a property interest cognizable under the Due Process Clause of the United States Constitution and that her various due process claims should not have been submitted to the jury. However, the opinion below nevertheless upheld the general verdict against petitioners by adopting a new procedural rule -- the "two issue" rule -- which preserves a general verdict if any one of the theories submitted to the jury is valid

even though the others are not (Appendix A, pp. 43-53). The opinion does not acknowledge that it overruled Code 56-6-26 which requires that such a verdict be set aside.<sup>1</sup> None of the parties had requested such a change in the law or had otherwise raised the issue.

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<sup>1</sup>The opinion below misconstrues dicta in three old West Virginia decisions to foster the notion that the "two-issue" rule is not new to West Virginia. One such decision relied on the harmless error doctrine to preserve a tainted verdict. Miller v. White, 36 W. Va. 67, 33 S.E. 332 (1899) (Appendix A, p. 23.) Another was decided under a statute repealed in 1923 which read "when there are several counts, one of which is faulty, \* \* \*, the verdict shall be good." Freeman v. Monongahela Valley Traction Co., 98 W. Va. 311, 128 S.E. 129 (1924). The third relies on the statutory exception to present W. Va. Code § 56-6-26, which allows affirmance where it is clear the verdict was not based on the bad count. Gilkerson v. Baltimore and Ohio Railroad Co., 129 W. Va. 649, 41 S.E.2d 188 (1946). All

To provide a mechanism to avoid the potentially harsh effects of this rule, the opinion below adopted a "corollary rule" that "a defendant may submit a special interrogatory or verdict to require the jury to state its findings as to each theory." (Appendix A, p. 49.) The opinion then retroactively imposed this requirement on the petitioners, finding that no such special findings had been requested at trial.<sup>2</sup>

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three decisions reversed the trial court on other grounds. The apparent misuse of these decisions below led petitioners' counsel to assert in the Petition for Rehearing that "the Court's sua sponte effort to avoid a reversal in this case compromises the appearance of impartiality in its decisions."

<sup>2</sup> Apparently the court felt that defense counsel's proposed interrogatories were inadequate under this new rule. Interrogatory No. 6 stated: "6. Whether plaintiff's termination was in substantial part based on her exercise of free speech." (Appendix B, p. 5.)

The actions of the West Virginia Supreme Court of Appeals constitute state action.

"The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930).

A functionally identical procedural snafu was correctd by this Court in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, supra, wherein a state court

---

The trial court rejected the interrogatories because they were "covered by the instructions." (Appendix B, pp. 1-2.) Had he been presciently aware of the "two-issue" rule, the trial judge may well have accepted them. Many jury instructions were amended by the trial court to conform to existing law. Any imperfections in the interrogatories could likewise have been corrected had their importance been known. Sheeler v. City of Waterbury, 138 Conn. 111, 82 A.2d 359 (1951).

denied an injunction against the collection of an allegedly discriminatory tax assessment, asserting that the taxpayer had an administrative remedy before the county board of equalization. On appeal, the State's highest court held that the board of equalization in fact had no authority to remedy the assessment, but nevertheless affirmed on the basis that the taxpayer could have obtained a remedy from the state tax commissioner "at any time before the tax books were delivered to the collector." No party to the proceedings had raised this idea because only a few years before, the same state high-court had clearly held that the tax commissioner had no such authority. Unfortunately, the tax books had been delivered before the overruling decision was made, and

the taxpayer was left with no remedy except review by this Court, which Court reversed and remanded.

This decision was neatly paraphrased in Bouie v. Columbia, 378 U.S. 347, 354 (1964):

"When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' \* \* \*" Id., 378 U.S. at 354 citing Brinkerhoff-Faris Trust & Sav. Co. v. Hill.

The efforts of petitioners' counsel at trial and on appeal were effectively nullified by the action of the court below. Petitioners were thus denied due process "in its primary sense of an

[effective] opportunity to be heard and defend." Id.

The United States Supreme Court has held that due process requires that meaningful notice and hearing be given prior to the deprivation of any substantial property or liberty interest.

Perry v. Sindermann, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). The judgment against petitioners is in excess of Thirty-six Thousand Dollars (\$36,000.00), a substantial property interest.

Further, in Griffin v. Illinois, 351 U.S. 12 (1956), this Court held that, where a state has granted appellate review, an appeal cannot be arbitrarily denied. While this case applies specifically to indigent criminal defendants, the rule should be applied

where an appellate court arbitrarily denies effective review and thereby causes manifest injustice. Petitioners were effectively denied any notice of how to preserve their rights at trial, and were thus denied their entitlement to meaningful review.

By changing the existing law without notice, the court below denied to petitioners the benefit of the law they relied on at trial. By retroactively imposing on defense counsel the duty to request separately stated verdicts, the court denied to petitioners the benefit of the new rule as well as the old. The opinion below invokes and moulds the "two-issue" rule to achieve a unique result in a single case, an action so arbitrary that this

Court should intervene to preserve judicial integrity.

IV.

THE INCREASING NUMBER OF CIVIL RIGHTS ACTIONS PROSECUTED UNDER 42 U.S.C. SECTION 1983 IN STATE COURTS SUGGESTS THAT THIS COURT SHOULD REVIEW THIS CASE TO CLARIFY THE ROLE OF FEDERAL "PROCEDURAL" DOCTRINES IN STATE COURT.

Title 42 U.S.C. § 1983 is a federal statute. The First Amendment provides federal constitutional rights. The substantive issues below were uniformly federal issues. The elements of respondent's prima facie case and the petitioners' defenses as well as the allocation of the burdens of production and persuasion were dictated by this Court's declarations in Pickering v. Board of Education, 391 U.S. 563 (1968) and Mt. Healthy City Board of Education v.

Doyle, 429 U.S. 274 (1977). In those decisions (the first of which reviewed a state high-court's decision) this Court's formulation of the issues and burdens of proof flowed from its consideration of the societal value of freedom of expression versus the state's interest in the efficient and orderly administration of its governmental obligations.

Research discloses no other helpful indication of the extent to which state courts should look to federal law for guidance in procedural matters that may affect the outcome of First Amendment litigation. However, the analogous problems faced by the federal courts when entertaining diversity actions founded on state law provide helpful guidance. Such decisions indicate that

in the instant case, the federal rule regarding the effect of a general verdict founded on good and bad counts should have been applied by the West Virginia Supreme Court of Appeals.

"It was decided in Erie R. Co. v Tompkins that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. \* \* \*" Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 535 (1958).

State "substantive" law thus controls a diversity action in federal court. Since First Amendment actions are grounded on "rights and obligations" created by the United States Constitution, federal "substantive" law should control civil-rights actions predicated on freedom of expression.

In diversity cases, federal courts generally apply federal procedures, unless contrary state procedures are outcome-determinative in a systematic manner, in which case the federal court is bound by the state procedure. Byrd, supra; Guaranty Trust Co. v. York, 326 U.S. 99 (1958). In such circumstances, the procedural rule is treated as "substantive" law.

The United States Sixth Circuit Court of Appeals is the only court (known to this writer) that has directly addressed the issue of whether the "two-issue" rule is substantive or procedural. The question arose in three diversity cases wherein the federal district courts were applying state substantive law. In each case the Sixth Circuit held that the "two-issue" rule

was substantive rather than procedural, since the outcome of the appeals was determined by the rule. Adkins v. Ford Motor Company, 446 F.2d 1105 (6th Cir. 1971); Martin v. Weaver, 666 F.2d 1013 (6th Cir. 1982); Tracy v. Finn Equipment Company, 290 F.2d 498 (6th Cir. 1961).

Absent unusual circumstances, federal law requires that a verdict founded on a complaint containing a defective count be reversed regardless of the good counts. Sunkist Growers v. Winckler & Smith Citrus Products Co., 270 U.S. 19 (1962); Maryland v. Baldwin, 112 U.S. 490 (1884).

Since plaintiffs' causes of action were dependent entirely on federal law, federal law should control the disposition of the case when one of these causes of action is held improper. The

case should be reversed and remanded per  
Sunkist Growers, supra, and Maryland v.  
Baldwin, supra.

CONCLUSION

For the reasons stated, petitioners  
pray that this petition be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Silas B. Taylor, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the within Petition for Certiorari upon Patrick S. Cassidy, counsel for respondent, by placing three (3) true copies thereof in a United States mailbox, first-class postage prepaid, this 13<sup>th</sup> day of June, 1984, addressed as follows:

Patrick S. Cassidy, Esquire  
O'Brien, Cassidy & Gallagher  
806 Central Union Building  
Wheeling, West Virginia 26003

Silas B. Taylor  
SILAS B. TAYLOR

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Justice McHugh, deeming himself disqualified, did not participate in the consideration or decision of this case.

Justice Neely dissents and reserves the right to file a dissenting opinion.

NO. 15477

E. JEAN ORR

v.

DANIEL B. CROWDER, ETC., ET AL.

## Kanawha County

Affirmed

Miller, Justice

1. "A teacher who has satisfied the objective eligibility standards for tenure adopted by a State college has a sufficient entitlement so that he cannot be denied tenure on the issue of his competency without some procedural due process." Syllabus Point 3, State ex rel. McLendon v. Morton, W. Va. , 249 S.E.2d 919 (1978).

2. Before a protected property interest, such as a right to tenure, can be found, something more than a unilateral expectation must be shown. It must be demonstrated that there existed some rules or understandings governing tenure eligibility fostered by the college upon which the college employees relied.

3. Under Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights. However, Pickering recognized that the State as an employer, also has an interest in the efficient and orderly operation of its affairs that must be balanced with the

public employees' right to free speech,  
which is not absolute.

4. In a suit under 42 U.S.C. § 1983, where the plaintiff claims that he was discharged for exercising his First Amendment right of free speech, the burden is initially upon the plaintiff to show: (1) that his conduct was constitutionally protected; and (2) that his conduct was a substantial or motivating factor for his discharge. His employer may defeat the claim by showing that the same decision would have been reached even in the absence of the protected conduct.

5. In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved

by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

6. Where a jury returns a general verdict in a case involving two or more liability issues and its verdict is supported by the evidence on at least one issue, the verdict will not be reversed, unless the defendant has requested and been refused the right to have the jury make special findings as to his liability on each of the issues.

7. "Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if

it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer." Syllabus Point 2, Mason County Board of Education v. State Superintendent of Schools, W. Va. , 295 S.E.2d 719 (1982).

8. "The collateral source rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party."

Syllabus Point 7, Ratlief v. Yokum,

W. Va. , 280 S.E.2d 584 (1981).

9. "'Ordinarily where objections to questions or evidence by a party are

sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error.'" Syllabus Point 5, State v. Gwinn, W. Va. , 288 S.E.2d 533 (1982), quoting Syllabus Point 7, State v. Arnold, W. Va. , 219 S.E.2d 922 (1975), overruled on other grounds, State v. Demastus, W. Va. , 270 S.E.2d 649 (1980), and Syllabus Point 18, State v. Hamric, 151 W. Va. 1, 151 S.E.2d 252 (1966).

Miller, Justice:

The defendants, Daniel Crowder, president of the West Virginia Northern Community College (hereinafter the College), and Gregory Adkins, the College's dean of academic affairs, are appealing the judgment entered against them in an action brought under 42 U.S.C. § 1983<sup>1</sup> in the Circuit Court of Kanawha County. The plaintiff, E. Jean Orr, who was formerly a librarian at the College, was awarded damages totaling \$26,400 against Drs. Crowder and Adkins, as well as attorney's fees in the amount of \$10,405.75 against the West Virginia Board of Regents.<sup>2</sup>

Although additional errors are asserted, the primary contention of the defendants is that Mrs. Orr was not entitled to any relief as a matter of

law. Therefore, the defendants argue, the trial court erred in refusing to grant the defendants' motions for a directed verdict. We disagree with the defendants and affirm the judgment.

After the defendants had given Mrs. Orr a one-year terminal contract for the 1976-77 school year, she filed this civil action alleging that the defendants had violated her procedural due process and her free speech rights under the First Amendment to the United States Constitution. Her procedural due process claim was based on her contention that she had acquired tenure rights, arising from agreements made with the defendants, and therefore, was entitled to the procedural protections afforded to dismissed tenured faculty members. The First Amendment cause of

action was grounded in the plaintiff's argument that she was given the terminal contract as a result of her criticizing proposed plans for the remodeling of the College's Learning Resources Center.

The facts surrounding Mrs. Orr's status with the College may be briefly summarized. Additional facts to illuminate her two causes of action will be discussed separately. Mrs. Orr was hired initially in 1971 as a librarian at the Wheeling campus of West Liberty State College, which was later reorganized as the West Virginia Northern Community College. Her employment continued for five years under one-year contracts until the spring of 1976, when she was given the terminal contract.

During her employment, she was promoted from librarian to director of

library services, which involved supervising and administering the personnel, libraries, and related services not only at the Wheeling campus but also the Weirton and New Martinsville divisions of the College. Her title was changed to director of learning resources in 1975.

During the critical period, i.e. the 1975-76 school year, when Mrs. Orr contends the events occurred that led to her being given a terminal contract, the president of the College was Dr. Crowder and her immediate superior was Dr. Adkins. It was Dr. Adkins who recommended the terminal contract, which recommendation was concurred in by Dr. Crowder.

## I. PROCEDURAL DUE PROCESS CLAIM

Mrs. Orr's procedural due process claim is based, in large part, on the fact that in 1973, the West Virginia Board of Regents gave college presidents the authority to grant faculty status to librarians. The plaintiff contends that in conversations with Drs. Adkins and Crowder in the fall of 1975 she was promised faculty status and that such faculty status would be made retroactive to July, 1971, the date on which she was first hired. Drs. Adkins and Crowder, while admitting faculty status was offered to Mrs. Orr, testified that they agreed to extend it back to July, 1974, not July, 1971.

Mrs. Orr relies heavily on State ex rel. McLendon v. Morton, W. Va. , 249 S.E.2d 919 (1978), where we provided

some procedural due process rights to an assistant professor at a community college who had met the eligibility standards for tenure. In Syllabus Point 3 of McLendon we said:

"A teacher who has satisfied the objective eligibility standards for tenure adopted by a State college has a sufficient entitlement so that he cannot be denied tenure on the issue of his competency without some procedural due process."

McLendon in turn relied on Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), and Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), where the United States Supreme Court recognized that property interests could not be withdrawn by governmental action without appropriate due process procedures. In Roth, the United States Supreme Court

indicated that protected property interests were not limited to the traditional concepts of real and personal property. It pointed out that a benefit which merits protection as a property interest is one to which there is more than a "unilateral expectation," and there must exist rules or understandings which can be characterized as giving the claimant "a legitimate claim of entitlement to [the benefit]." 408 U.S. at 577, 33 L. Ed.2d at 561, 92 S. Ct. at 2709.

Roth involved an assistant professor at a state university who had been hired on a one-year contract that was not renewed. A state statute granted tenure after four years of continuous service. The United States Supreme Court held that since he did not have

the requisite years of service, he did not have a protected property interest that would be afforded constitutional procedural due process protection.

In Perry, a professor had been employed for four years at a junior college. He claimed that the college had a de facto tenure program under which he qualified. The United States Supreme Court concluded that his claim had been improperly dismissed since he was not given the opportunity to prove the existence of and his eligibility for the de facto tenure program. It concluded that if the professor could establish these facts, then he would have shown a legitimate claim of entitlement to tenure and would be entitled to procedural due process protection.

The plaintiff's claim for tenure eligibility must be viewed against several facts which are undisputed. First, it was not until 1973 that the Board of Regents gave discretionary authorization to college presidents to extend grants of faculty status to librarians. Second, there was no formal policy adopted by the Board of Regents as to how the discretionary grant of faculty status for librarians should be awarded. Furthermore, there was no policy formulated with regard to whether a librarian given faculty status could receive credit toward tenure for the years worked prior to faculty status designation.

It is this lack of any formal policy for retroactive faculty status that forms the heart of the controversy

on the tenure eligibility issue. The plaintiff argues that she was promised faculty status retroactive to July, 1971. With this as her beginning date, plaintiff states that she would have accumulated five years of faculty status at the end of the 1975-76 academic year, which would have then given her tenure eligibility under McLendon.<sup>3</sup>

The evidence on the offer of retroactive faculty status is diametrically opposed. The plaintiff asserts that after several meetings with Drs. Adkins and Crowder, she was orally promised faculty status back to her initial employment in July, 1971. According to the plaintiff, this promise was made in a meeting with Drs. Adkins and Crowder on November 20, 1975. On the following day, the plaintiff wrote a memorandum to

Dr. Adkins requesting some time to consider the offer. Prior to receiving any response to this memorandum, Mrs. Orr wrote another memorandum to Dr. Adkins dated December 4, 1975, in which she "accepted" the offer of retroactive faculty status. The defendants deny making such a promise to the plaintiff.

Near the end of 1975, Dr. Adkins advised the plaintiff that faculty status was granted to two other employees of the College's Learning Resources Center, retroactive to July 1, 1974. At this time, he also informed the plaintiff that her status would be determined after Christmas. The plaintiff wrote to Dr. Adkins requesting a decision on her faculty status and on February 24, 1976, Dr. Adkins responded that she would be granted faculty status

effective July 1, 1974. This was confirmed by the College president, Dr. Crowder, in a letter dated April 6, 1976.

We believe that it is fundamental under Roth and Perry, as well as under McLendon and related cases, that before a protected property interest, such as a right to tenure, can be found, something more than a unilateral expectation must be shown. Plaintiff must demonstrate that there existed some rules or understandings governing tenure eligibility fostered by the college upon which the college employees relied. We do not believe that the plaintiff can create in an ex parte fashion the rules or understandings tailored to the facts of her particular case. If this were possible, every claim involving a unilateral

expectation would be converted to a legitimate claim of entitlement by a plaintiff testifying that tenure had been promised in his particular case.<sup>4</sup>

The United States Supreme Court in both Roth and Perry took occasion to point out that legitimate claims of entitlement to job tenure "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Roth, 408 U.S. at 577, 33 L. Ed.2d at 561, 92 S. Ct. at 2709. See also note 7, Perry, 408 U.S. at 602, 33 L. Ed.2d at 580, 92 S. Ct. at 2700. Here there was no showing of any such general understanding or rule with regard to retroactive faculty status.

The plaintiff urges two additional points in regard to her procedural due

process claim. First, she claims that Dr. Crowder was obliged to accept the recommendation of the faculty appeals committee, which had considered her claim for retroactive faculty status and had found that the plaintiff was entitled to faculty status as of July 1, 1971. However, there was no administrative policy at the College nor any requirement under the Board of Regents' Policy Bulletin No. 36 making such a recommendation binding upon Dr. Crowder. Under the Board of Regents' Revised Policy Bulletin No. 40, college presidents are empowered to make the final decisions at the college level on all personnel matters,<sup>5</sup> subject to the right of appeal to the Board of Regents under its Policy Bulletin No. 36.<sup>6</sup>

Her other procedural due process issue was that she was entitled to be evaluated by a faculty member instead of by Dr. Adkins. The College had an evaluation policy, Defendants' Exhibit No. 3, and under it, Mrs. Orr as an administrator of the library was supposed to be evaluated by Dr. Adkins. We find no merit factually on this point.<sup>7</sup>

For the foregoing reasons, we agree with the defendants that the plaintiff's procedural due process claim fails as a matter of law.

## II. FIRST AMENDMENT CLAIM

Mrs. Orr claims that her termination resulted from her criticism in the fall of 1975 of the administration's proposed plan for remodeling the Learning Resources Center. These criticisms were voiced in one or more

meetings at which Drs. Adkins or Crowder were present and caused them to become angry with her. From this point on, the plaintiff claims that her relationship with them deteriorated. Even though her suggestions were ultimately accepted, she received an adverse evaluation from Dr. Adkins which both he and Dr. Crowder utilized as a reason for giving her a terminal contract in the spring of 1976.

We recognize that under Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed.2d 811, 88 S. Ct. 1731 (1968), public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights.<sup>8</sup> However, Pickering recognized that the State, as

an employer, also has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employees' right to free speech, which is not absolute.<sup>9</sup> Consequently, some general restrictions on a public employee's right to free speech were recognized in Pickering. First, speech, to be protected, must be made with regard to matters of public concern. Second, statements that are made "'with the knowledge [that they] . . . were false or with reckless disregard of whether [they were] . . . false or not,'" are not protected. 391 U.S. at 569, 20 L. Ed.2d at 817, 88 S. Ct. at 1735. Third, statements made about persons with whom there are close personal contacts which would disrupt "discipline . . . or harmony among

coworkers" or destroy "personal loyalty and confidence" may not be protected. 391 U.S. at 570, 20 L. Ed.2d at 818, 88 S. Ct. at 1735.<sup>10</sup>

The primary argument advanced by the defendants against plaintiff's First Amendment claim is that she failed to show by a preponderance of the evidence that her criticism of the remodeling plans was a substantial or motivating factor<sup>-</sup> in her being given a terminal contract. This is the test prescribed in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 50 L. Ed.2d 471, 97 S. Ct. 568 (1977), where the United States Supreme Court allocated these evidentiary burdens:

"[T]he burden [is] properly placed upon [plaintiff] to show that his conduct [was] constitutionally protected, and that this conduct was a 'substantial factor'--or, to

put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. [Plaintiff] having carried that burden, however, . . . the Board had [to show] by a preponderance of the evidence that it would have reached the same decision as to [plaintiff's] reemployment even in the absence of the protected conduct." 429 U.S. at 287, 50 L. Ed.2d at 484, 97 S. Ct. at 576.  
(Footnote omitted)

We eschew any attempt to read the Mt. Healthy test as requiring the plaintiff to show that her exercise of her First Amendment rights was the "sole" or "only" factor precipitating the terminal contract. As the court said in Bowen v. Watkins, 669 F.2d 979, 984-85 (5th Cir. 1982): "The opinion in Mt. Healthy clearly contemplates that a decision may be the product of more than one substantial factor; it refers to 'a substantial factor'. 429 U.S. at 287,

[50 L. Ed.2d at 484], 97 S. Ct. at 576 (emphasis added)." See also Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981), cert. denied, 455 U.S. 1021, 72 L. Ed.2d 139, 102 S. Ct. 1719 (1982); Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983); Boussom v. City of Elkhart, 567 F. Supp. 1382 (N.D. Ind. 1983); Visser v. Magnarelli, 530 F. Supp. 1165 (N.D. N.Y. 1982).

The record fairly demonstrates that prior to October 5, 1975, the date on which the remodeling plans were shown to Mrs. Orr by Dr. Adkins, there had been relatively little controversy between Mrs. Orr and either Drs. Adkins or Crowder. Prior to this time, Mrs. Orr had had some preliminary discussions with her superiors regarding the faculty status question under the Board of

Regents' discretionary authorization.

However, it does not appear that these discussions had resulted in any concrete proposals nor does it appear that they engendered any ill feelings.

It also does not appear that there was any objective evidence that either Drs. Adkins or Crowder were dissatisfied with Mrs. Orr's job performance prior to the fall of 1975. Before Mrs. Orr came under the supervision of Dr. Adkins, she reported to Dr. Charles Rorie, who was the dean of instruction. He evaluated her on July 26, 1974, for the 1973-74 academic year. His report was essentially favorable and began with this statement: "Mrs. Orr is a hard worker and is committed to the development of a comprehensive community college Learning Resources Center here at West Virginia

Northern Community College." The report went on to note that she would be given "increased responsibilities of the supervising and directing of a total Learning Resources Program for our multicampus system" for the 1974-75 academic year. This granting of increased responsibilities to Mrs. Orr can only be interpreted as a sign that her work performance was good.<sup>11</sup>

Some six months later on January 31, 1975, Dean Rorie made another written evaluation of Mrs. Orr which concluded:

"At this point in time, I am satisfied with your performance and prospects as Chairperson of the Division of Learning Resources. I recommend faculty status, consideration for tenure when eligible under the rules of our evaluation system, and redesignation as Director of the Learning Resources Center,

college-district-wide, at  
WVNCC."

The record discloses that on February 1, 1975, Mrs. Orr was transferred for reporting and evaluating purposes to Dr. Adkins. His first evaluation made on September 8, 1975, while rather cursory, could not be called a negative evaluation.<sup>12</sup>

It was Dr. Adkins' written evaluation of Mrs. Orr dated March 8, 1976, that was deemed to be sufficiently negative to warrant her nonretention. This evaluation begins by reviewing several of her favorable accomplishments.<sup>13</sup> Dr. Adkins subsequently outlines several problem areas, which can be summarized as follows: (1) the submission of invoices directly to the business office rather than to Dr. Adkins' office; (2) the controversy

regarding possible faculty status of the personnel in the Learning Resources Center; and (3) the statements referring to the Learning Resources Center as "Learning Laboratories."

It is clear from Mrs. Orr's testimony that her adverse criticism of the proposed plans for the new library facility engendered considerable anger with Drs. Adkins and Crowder. Her basic criticism of the plan was that the library was laid out so that most of the main student traffic in traveling to and from class rooms would pass through the library area. This would have disrupted the library patrons and would have provided little security for the library collection. These objections were pointed out to Dr. Adkins and Mrs. Orr suggested that the plans might be shown

to the Learning Resources Committee. He refused this suggestion, stating that the plans were to be kept confidential. She testified that in early October of 1975 she met privately with Dr. Adkins to discuss her concerns over the proposed plans.

On October 10, 1975, at a faculty meeting where Dr. Adkins was not present, other members raised questions about the plans and a committee was appointed consisting of the division chairpersons, including the plaintiff, to discuss the plans with Dr. Crowder. The following day, at an administrative meeting, Mrs. Orr was accosted by Dr. Adkins in an angry fashion about what had occurred at the faculty meeting. Later that same day, Dr. Adkins met with

Mrs. Orr and indicated that he would review the plans.

At a subsequent meeting on October 14, 1975, with the division chairpersons, at which Mrs. Orr, Drs. Adkins and Crowder were present, the library plans were discussed. Mrs. Orr testified that she was verbally attacked by Dr. Crowder, who inferred that she had been given ample opportunity for advance input as to the plans.<sup>14</sup>

Although the administration later permitted the Learning Resources Committee to have access to the plans and make recommendations as to changes, which were ultimately adopted, it would appear that from this point on, Drs. Adkins and Crowder adopted a negative position with regard to Mrs. Orr. They limited her claims for retroactive

faculty status and, based on the March 26, 1976 evaluation by Dr. Adkins, advised her in April that she would be given a terminal contract.

A number of courts have dealt with the question of whether the plaintiff has shown a sufficient connection between the claimed violation of First Amendment rights and the ultimate discharge. In Mazaleski v. Treusdell, 562 F.2d 701, 715 (D.C. Cir. 1977), the court characterized this issue:

"This principle has often proved more difficult to apply than to justify, however, because the actual grounds for the dismissal of a government employee may not be readily ascertainable, and almost always are vigorously contested by the litigants. Some test is necessary, then, to diagnose the essential causative factor underlying what is frequently a complex decision, cloaked in subjectivity, for the fact that the government may have considered an

employee's protected speech or conduct in reaching an adverse personnel decision does not necessarily render that decision constitutionally infirm."

The court then proceeded to discuss the Mt. Healthy test and concluded that "[t]he touchstone for decision, therefore, is the employee's job performance considered in its entirety." 562 F.2d at 715.

In Zoll v. Eastern Allamakee Community School District, 588 F.2d 246, 250 (8th Cir. 1978), the court discussed the following principle of judicial review:

"Circumstantial as well as direct evidence of intent is relevant to a determination of sufficiency. Williams v. Anderson, 562 F.2d 1081, 1086 (8th Cir. 1977). A verdict may be directed or a jury verdict overturned 'only where the evidence points all one way and is susceptible of no reasonable inferences

sustaining the position of the nonmoving party.' Giordano v. Lee, 434 F.2d 1227, 1231 (8th Cir. 1970) (emphasis in original)."

In Zoll, a teacher had written two letters to the editor of a local newspaper in June and July of 1974. These letters criticized her school principal, the school superintendent and several school board members for a decline in administrative concern with academic excellence. In August of 1974, she was asked to come to her principal's office. He expressed concern over her letters, accused her of misrepresenting the facts and suggested that she had not sent her opinions through proper channels.

In February of 1975, the Board determined that as a result of an enrollment projection for the coming year a reduction in the staff of first

grade teachers was warranted. The Board proceeded to follow procedures adopted by the Iowa Department of Public Instruction in determining the pool of teachers from which layoffs were to be made. This included testing procedures to determine who would be laid off. Mrs. Zoll, while scoring the highest on the objective portion of the test, received the lowest score on the subjective evaluation and as a result received the overall lowest score. She was advised of her termination in April of 1975. The court of appeals ruled that there was sufficient circumstantial evidence to support the jury's award.

Without attempting a factual analysis of the various cases upholding jury verdicts on First Amendment claims based on circumstantial evidence, we

believe the following cases provide support for finding that the evidence is sufficient to support the jury verdict in this case. Allaire v. Rogers, 658 F.2d 1055 (5th Cir. 1981), cert. denied, 456 U.S. 928, 72 L. Ed.2d 443, 102 S. Ct. 1975, reh. denied, 457 U.S. 1126, 73 L. Ed.2d 1343, 102 S. Ct. 2949 (1982); D'Andrea v. Adams, 626 F.2d 469 (5th Cir. 1980), cert. denied, 450 U.S. 919, 67 L. Ed.2d 345, 101 S. Ct. 1365 (1981); Yoggerst v. Stewart, 623 F.2d 35 (7th Cir. 1980); McGill v. Board of Education of Pekin Elementary School District, 602 F.2d 774 (7th Cir. 1979); Bernasconi v. Tempe Elementary School District No. 3, 548 F.2d 857 (9th Cir.), cert. denied, 434 U.S. 825, 54 L. Ed.2d 82, 98 S. Ct. 72 (1977); Allen v. Autauga County Board

of Education, 685 F.2d 1302 (11th Cir. 1982).

We have traditionally held that in determining whether the jury verdict is supported by the evidence "every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syllabus Point 3, in part, Walker v. Monongahela Power Co., 147 W. Va. 825, 131 S.E.2d 736 (1963). See also Syllabus Point 3, Royal Furniture Co. v. City of Morgantown, W. Va. , 263 S.E.2d 878 (1980); Syllabus Point 5, First National Bank of Ronceverte v. Bell, W. Va. , 215 S.E.2d 642 (1975).

Furthermore, we have customarily held as stated in Syllabus Point 5, in part, Young v. Ross, 157 W. Va. 548, 202 S.E.2d 622 (1974), that "[i]t is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will not ordinarily be disturbed." See also Syllabus Point 5, Ilosky v. Michelin Tire Corp., W. Va., 307 S.E.2d 603 (1983); Syllabus Point 2, Rhodes v. National Homes Corp., W. Va., 263 S.E.2d 84 (1979); Syllabus Point 2, Skeen v. C and G. Corp., 155 W. Va. 547, 185 S.E.2d 493 (1971); Yuncke v. Welker, 128 W. Va. 299, 36 S.E.2d 410 (1945).

Thus, if we combine the foregoing principles, it is clear that in determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Tested by the foregoing standards, we believe that with regard to the plaintiff's First Amendment claim the jury's verdict should be upheld. The plaintiff's evidence demonstrated that

prior to the fall of 1975, she had worked at the College for a period of four years and had been given increased responsibilities by her superiors relative to the Learning Resources Center on the Wheeling campus as well as on the other campuses. She had received no unsatisfactory work evaluations during this period, which included the September 8, 1975 evaluation by Dr. Adkins.

The controversy over the proposed library plans began in early October of 1975. Both Drs. Crowder and Adkins were angered by Mrs. Orr's objections to the plans and expressed their anger to her at faculty meetings. Although the administration receded and revised the proposed plans to meet the recommendations of Mrs. Orr, the Learning

Resources Committee and the special faculty committee, it is apparent that Mrs. Orr was deemed by Drs. Adkins and Crowder to have been primarily responsible for the opposition to the proposed plans. Her request for faculty status back to the date of her initial employment was denied. It is not without significance that the first written notification Mrs. Orr received from Dr. Adkins concerning his position on her retroactive faculty status was made in a memorandum dated October 23, 1975, just eight days after Dr. Adkins had verbally attacked Mrs. Orr at a meeting. In the memorandum, Dr. Adkins recommended that the plaintiff be given faculty status as of July 1, 1975.

While the defendants gave retroactive faculty status to two other

librarians in December of 1975, they withheld their decision on the plaintiff's status. It was not until the plaintiff inquired in February of 1976 as to her status that she received a decision. This was followed by her first negative performance evaluation made on March 8, 1976, by Dr. Adkins and it was this evaluation which led to her terminal contract in April of 1976. We believe that a jury could properly find that her criticism of the remodeling plans in October of 1975, which the evidence shows clearly angered Drs. Adkins and Crowder, resulted in a series of detrimental moves against her that culminated in her nonretention.<sup>15</sup>

### III. TWO-ISSUE RULE

Although the defendants do not specifically address this issue, the

question arises as to whether the general verdict in favor of the plaintiff can stand where one of the two theories of recovery, i.e. the violation of her procedural due process rights, has been found to be insufficient as a matter of law.

There is a split of authority on this point as evidenced by this statement from 76 Am.Jur.2d Trials § 1149 at 120 (1975):

"According to some authorities, where several counts are set out in a declaration and there is evidence to support one of the counts, a general verdict will be sustained, although the plaintiff fails to prove the other counts. According to other authorities, a general verdict cannot be sustained in the absence of evidence to support one of the causes of action declared upon, at least where it is impossible to tell on which cause of action the damages were allowed." (Footnotes omitted)

This point of law is sometimes referred to as the two-issue rule. E.g., Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978); Anderson v. West, 270 S. C. 184, 241 S.E.2d 551 (1978); 5 Am. Jur.2d Appeal and Error § 787 (1962). Although there is a split of authority, we believe that a majority of courts which have recently considered the issue have concluded that where a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed. E.g., Adkins v. Ford Motor Co., 446 F.2d 1105 (6th Cir. 1971) (Applying Tennessee law); Automotive Acceptance Corp. v. Powell, 45 Ala. App. 596, 234 So.2d 593 (1970); Reese v. Cradit, 12 Ariz. App. 233, 469 P.2d 467 (1970); Codekas v.

Dyna-Lift Co., 48 Cal. App. 3d 20, 121 Cal. Rptr. 121 (1975); Filisko v. Bridgeport Hydraulic Co., 176 Conn. 33, 404 A.2d 889 (1978); Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978); Moore v. Jewel Tea Co., 46 Ill. 2d 288, 263 N.E.2d 103 (1970); Knisely v. Community Traction Co., 125 Ohio St. 131, 180 N.E. 654 (1932); Anderson v. West, 270 S.C. 184, 241 S.E.2d 551 (1978); Alex v. Armstrong, 215 Tenn. 276, 385 S.W.2d 110 (1964); Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982). Contra, Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978); Gonyea v. Duluth, Missabe & Iron Range Ry. Co., 220 Minn. 225, 19 N.W.2d 384 (1945); Martin v. Northern Pac. Ry. Co., 51 Mont. 31, 149 P. 89 (1915); Heinen v. Heinen, 64 Nev.

527, 186 P.2d 770 (1947); Maccia v. Tynes, 39 N.J. Super. 1, 120 A.2d 263 (1956); Hamilton v. Presbyterian Hospital of the City of New York, 25 A.D.2d 431, 267 N.Y.S.2d 656 (1966); Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974); Bredouw v. Jones, 431 P.2d 413 (Okla. 1967); Norfolk & W. Ry. Co. v. Mace, 151 Va. 458, 145 S.E. 362 (1928). Although most courts do not give any extended discussion of the policy behind the rule, in Knisely v. Community Traction Co., 125 Ohio St. at 133, 180 N.E. at 654, this statement was made:

"The [two-issue] rule . . . is a rule of policy. . . . The soundness or unsoundness of the rule cannot be argued upon principle because no principle is involved. It is purely and solely a question as to whether the trial court will be held to a strict accountability to submit each and every issue in a case free from error, or whether, on the

other hand, if one issue complete in itself as a cause of action or defense is submitted free from error, and there is nothing to indicate upon which issue a general verdict is grounded, other issues may be disregarded. The rule was designed to simplify the work of trial courts and to limit the range of error [in] proceedings."

Additionally, we fail to see the logic of a rule that requires a general verdict supported by one good theory of liability to be set aside. We are aware of no presumption that requires a court to assume that the jury has returned the verdict on the cause of action that was not supported by sufficient evidence. It must be remembered that in a civil case the burden of proof in order to prevail is only by a preponderance of the evidence.

Finally, we believe that any supposed unfairness to the defendants

arising from the adoption of the rule that permits the general verdict to be upheld if there is one valid cause of action to support it is cured by an additional corollary: that a defendant may submit a special interrogatory or verdict to require the jury to state its finding as to each theory. E.g. Codekas v. Dyna-Life Co., 48 Cal. App. 3d 20, 121 Cal. Rptr. 121 (1975); Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978).

In the present case, while the defendant's requested a number of special interrogatories, they did not seek a finding that would have required the jury to state its verdict separately as to each of the two counts.

We believe that our adoption of the rule permitting a general verdict to be

sustained if it is supported by one good theory of liability is not inconsistent with our prior law. We have not had occasion to discuss this question in any detail, although in Syllabus Point 6 of Miller v. White, 46 W. Va. 67, 33 S.E. 332 (1899), we said:

"Where two matters are submitted to a jury, one of them improperly submitted, and evidence is given pertinent alone to that improperly submitted, such improper submission to the jury, and the evidence thereon, will not affect the verdict on the matter properly before the jury, where the matters are distinct, and it appears that such improper submission and evidence did not confuse the jury, or operate to the prejudice of the party upon the issue properly before the jury."

In a related area, which evolved from our procedural law prior to the adoption of the Rules of Civil Procedure, we have held that where a

declaration contained several counts or causes of action and one count was bad as a matter of law, a general verdict sustained by a good count would be upheld. E.g., Syllabus Point 4, Gilkerson v. Baltimore & Ohio Railroad Co., 129 W. Va. 649, 41 S.E.2d 188 (1946); Syllabus Point 1, Freeman v. Monongahela Valley Traction Co., 98 W. Va. 311, 128 S.E. 129 (1924).<sup>16</sup> These cases referred to a procedural statute, W. Va. Code, 56-6-26,<sup>17</sup> which the Court in Freeman recognized as changing the common law rule. We see no reason to ignore the evolution of our own procedural law nor Syllabus Point 6 of Miller, particularly in light of the rule in other jurisdictions that is compatible with our law.

Consequently, we hold that where a jury returns a general verdict in a case involving two or more liability issues and its verdict is supported by the evidence on at least one issue, the verdict will not be reversed, unless the defendant has requested and been refused the right to have the jury make special findings as to his liability on each of the issues.

In setting this rule, we do not mean to imply that a trial judge is required to submit special interrogatories or verdicts to the jury in every case that involves multiple causes of action. See Syllabus Point 15, Carper v. Kanawha Banking & Trust Co., 157 W. Va. 477, 207 S.E.2d 897 (1974). If the judge believes there is sufficient evidence to support jury consideration

of the various causes of action, then he is free to refuse special interrogatories or verdicts.

It is only when the trial judge is specifically requested by the defendant to submit special findings and refuses to do so, and on appeal we conclude that one of the causes of action given to the jury is insufficient as a matter of law, that a reversal will occur. Here no such special finding was requested.

#### IV. OTHER ASSIGNED ERRORS

The remaining assignments of error asserted covering a variety of points may be disposed of without extensive discussion. The defendants argue that their defense of good faith immunity with regard to the procedural due process claim was established as a matter of law. We have held that the

procedural due process claim should have been dismissed as a matter of law and, therefore, it is unnecessary for us to consider this issue. The same reasoning applies to alleged errors in the instructions relevant to the procedural due process claim.

The defendants contend that Mrs. Orr failed as a matter of law to mitigate her damages by seeking other employment after she had been given notice of the 1976-77 terminal contract. Specifically, the defendants point to Mrs. Orr's failure to apply for any jobs during the 1976-77 school term when she was under her terminal contract, her refusal to accept job offers and her staying in England for four months with her husband, who was on a sabbatical. The burden of proving mitigation of

damages in a wrongful discharge case was discussed in Syllabus Point 2 of Mason County Board of Education v. State Superintendent of Schools, W. Va. , 295 S.E.2d 719 (1982).

"Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer."

The record discloses that Mrs. Orr did not make any job applications during the year of her terminal contract because she believed that she would eventually be reinstated to her position. We fail to see how Mrs. Orr can

be accused of failing to fulfill her duty to mitigate damages by not applying for other jobs at a time in which she was still employed. There is no evidence in the record that Mrs. Orr turned down any jobs offered to her. She testified that she was made aware of two possible jobs to which she could have applied. One was at a considerably reduced pay level and the other was only a temporary job and was located some forty miles from her home.

In Mason County, we quoted at some length from C. McCormick, Damages \$S 159, 160 (1935), including this statement with regard to a plaintiff's duty to take inferior jobs or work out of his locality: "[T]he plaintiff will only be charged with what he could have earned in another position of the same

grade, in the same line of work, and in the same locality.'" W. Va. at , 295 S.E.2d at 723-24. Under this rule, Mrs. Orr was not required to seek either job.

During the time that she was actually unemployed, Mrs. Orr testified that she had a considerable number of job interviews, but failed to be hired for another position until January, 1978. As for her brief stay in England, Mrs. Orr explained that if she had been able to acquire a work permit, she might have been able to be hired for a librarian position, but she would only have worked for a month or two. Under these circumstances, we conclude that the evidence does not support the defendants' claim that Mrs. Orr failed to mitigate her damages.

A further mitigation of damages point is raised. The defendants assert that the unemployment benefits received by the plaintiff should have been deducted from the final award of damages. In Ratlief v. Yokum, W. Va.

, 280 S.E.2d 584, 589-90 (1981), we discussed the collateral source rule at some length and concluded in Syllabus Point 7:

"The collateral source rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party."

We held in Jones v. Laird Foundation, Inc., 156 W. Va. 479, 195 S.E.2d 821 (1973), that the collateral source rule applies to workmen's compensation benefits and cannot be used to reduce damages. See also Ilosky v. Michelin

Tire Corp., W. Va. , 307 S.E.2d

603 (1983); Ellard v. Harvey, W. Va.

, 231 S.E.2d 339 (1976). We conclude that the trial court did not commit error in holding that unemployment benefits may not be used to reduce an award of damages under the collateral source rule. See generally 22 Am Jur. 2d Damages § 209 (1965); Annot., 4 A.L.R.3d 535 (1965).

The defendants maintain that the trial court erred in failing to grant a mistrial based upon the introduction of what is termed inflammatory evidence. Mrs. Orr testified that at work one day she discovered some newspaper clippings placed on her desk by some unknown person that concerned cases Mrs. Orr's attorney had lost. Dr. Adkins had previously denied placing any newspaper

clippings on Mrs. Orr's desk. After Mrs. Orr had completed her testimony on this point, the defendants moved to strike any reference to the newspaper clippings. The trial judge agreed that it was improper evidence and instructed the jury that it should disregard the references to the clippings. Subsequently, the defendants moved for a mistrial, claiming that the damage could not be undone, but this motion was denied by the trial judge.

We disagree that the reference to the newspaper clippings can be characterized as inflammatory. We believe that the trial court acted properly in cautioning the jury and denying the motion for mistrial. We stated in Syllabus Point 5 of State v. Gwinn, W. Va. , 288 S.E.2d 533

(1982), quoting Syllabus Point 7, State v. Arnold, W. Va. , 219 S.E.2d 922 (1975), overruled on other grounds, State v. Demastus, W. Va. , 270 S.E.2d 649 (1980), and Syllabus Point 18, State v. Hamric, 151 W. Va. 1, 151 S.E.2d 252 (1966):

"'Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error.'"

We noted in Gwinn that there are extraordinary situations where the introduction of evidence is so prejudicial that an instruction to disregard such evidence will be insufficient and a mistrial should be granted. See, e.g., Cannellas v. McKenzie, W. Va. , 236 S.E.2d 327 (1977); F. Cleckley, Handbook on Evidence for West Virginia Lawyers 38

(Supp. 1979). We do not find that the reference to the newspaper clippings rises to this high a level of prejudice. We, therefore, find no merit in the defendants' argument on this point.

Next it is alleged that the trial court erred in refusing to allow the defense counsel to ask leading questions in cross-examining the defendants, who had previously been called to the stand by the plaintiff as adverse party witnesses, pursuant to Rule 43(b) of the West Virginia Rules of Civil Procedure. The claim is made that the defense counsel's attempts to rehabilitate the defendants' testimony was hampered by the inability to ask leading questions. We have reviewed the trial transcript and do not find any instance where the defense counsel was unable to get

relevant evidence in through the examination of his clients after the plaintiff's counsel completed his examination under Rule 43(b). Moreover, defense counsel does not in his brief point to any such evidence. We, therefore, decline to address this issue.

The Board of Regents asserts that an award of attorney's fees pursuant to 42 U.S.C. § 1988 cannot be sustained in an action filed in a state court for violation of constitutional rights and therefore the court erred in awarding such fees. The United States Supreme Court was presented with this issue in Maine v. Thiboutot, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980), and concluded that the awarding of attorney's fees under 42 U.S.C. § 1988

is appropriate in either federal or state courts. See also Hutto v. Finney, 437 U.S. 678, 57 L. Ed.2d 522, 98 S. Ct. 2565 (1978). We therefore find no merit in this assignment of error. Cf. Syllabus Point 4, Mason County Board of Education v. State Superintendent of Schools, W. Va. , 295 S.E.2d 719 (1982).

Several errors are alleged regarding either the giving of plaintiff's or refusing to give defendants' instructions. The defendants assert error was committed in the trial court's refusal to give Defendants' Instruction No. 10, which stated that any damages awarded would have to be paid by the defendants personally and not by the State of West Virginia. We have examined all of the instructions and

find that there were no instructions that indicated that the State of West Virginia would be liable for the damages. The instructions given to the jury spoke of awarding damages against Drs. Crowder and Adkins and the verdict form was couched against each defendant. There was nothing to suggest to the jury that there was anything but personal liability. We, therefore, believe the court correctly refused Defendants' Instruction No. 10.

Two of plaintiff's instructions challenged by the defendants relate to the plaintiff's burden of establishing the First Amendment claim. Plaintiff's Instructions Nos. 3 and 13 were correct statements of the law and were thus properly given. Defendants' Instruction No. 19, which was refused, essentially

restated an argument taken from Mt. Healthy, 429 U.S. at 286, 50 L. Ed.2d at 483, 97 S. Ct. at 575, where Justice Rehnquist commented:

"A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision."

This was not a legal statement but an argument in support of the Mt. Healthy rule that a plaintiff's constitutional claim could be defeated if the defendant could show that the decision to fire the plaintiff rested on another adequate basis such as incompetency. We stated in Thornton v. CAMC, W. Va. , 305

S.E.2d 316, 325 (1983), that an instruction which incorporates language from an opinion which is argumentative need not be given as it may mislead the jury. We find no error in the rejection of this instruction.

The remaining claims of instructional errors relate to damages. Defendants' Instruction No. 7A which was refused stated that the plaintiff could not recover damages for mental anguish unless she suffered some physical injury. Defendants cite Harless v. First National Bank in Fairmont, W. Va. , 246 S.E.2d 270 (1978). However, as we pointed out in the subsequent appeal, Harless v. First National Bank in Fairmont, W. Va. , 289 S.E.2d 692 (1982), in Syllabus Point 3: "The tort of retaliatory discharge carries

with it a sufficient indicia of intent, thus, damages for emotional distress may be recovered as a part of the compensatory damages."

It appears that in a section 1983 action, the United States Supreme Court has fashioned a federal common law of damages which is apparently designed to make the damage remedies uniform and not necessarily dependent upon the law of U.S. 1021, 72 L. Ed.2d 139, 102 S. Ct. 1719 (1982); McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983).

In the present case, the plaintiff did produce psychiatric as well as lay testimony that she suffered mental and emotional distress as a result of her termination. We, therefore, conclude that the trial court committed no error in refusing this instruction. Nor do we

find any reversible error as to the plaintiff's damage instructions.

For the foregoing reasons, we affirm the judgment of the Circuit Court of Kanawha County.

Affirmed.

NO. 15477 - E. JEAN ORR V. DANIEL B. CROWDER, ETC., ET AL.

Neely, Justice, dissenting:

I cannot agree that a generally unsatisfactory public employee immunizes herself from dismissal by opening her mouth and uttering sound. I would agree that the First Amendment is a vital democratic protection; but allowing that constitutional protection to be used as a shield from firing by an employee who is disgruntled, disagreeable and inefficient, but not mute, trivializes the concept of free speech.

Mrs. Orr claims that she was not granted tenure because of her criticism of the plans for remodeling of the college's Learning Resources Center. Those comments were made at a faculty meeting which Mrs. Orr was attending because of her employee status. In upholding Mrs. Orr's claim, the majority opinion relies heavily on Pickering v. Board of Education, 391 U.S. 563 (1968). As the Supreme Court's most recent pronouncement on First Amendment rights of public employees emphasized, however, Pickering repeatedly talked about the rights of a public employee "as a citizen, in commenting upon matters of public concern." Connick v. Myers, 103 S.Ct. 1684, 1688 (1983). That emphasis reflected the Court's awareness that "government offices could not function

if every employment decision became a constitutional matter." Id.

In the case before us, Mrs. Orr was not speaking as a citizen. She was acting in her capacity as a librarian. Although the allocation of library space at a public institution is arguably a matter of tangential public concern, Mrs. Orr's comments were not motivated by her sense of duty as a citizen. Her concerns were those of an employee who disagreed with her superiors' decisions on a matter of internal policy. Her claim is that her superiors were angered by her decision not to discuss her criticisms with them before going to the entire faculty with a departmental gripe. Their displeasure at that approach does not seem unwarranted. If we extend First Amendment protection to

all such situations, this Court may well succeed in doing the impossible: we will make government operate even less efficiently than it does today.

The law may sometimes move in mysterious and burdensome ways, but it is not so mysterious and burdensome as all that. In Chitwood v. Feaster, 468 F. 2d 359 (4th Cir. 1972), another case dealing with untenured teachers in West Virginia, the Fourth Circuit set out the limited scope of First Amendment protection:

Some of the affidavits refer to what seems to be bickering and running disputes with the department heads. We do not intend to suggest that that kind of speech is protected by the First Amendment in the sense that it may not be considered in connection with the termination of the employment relationship. [An employer] has a right to expect [an employee] to follow instructions and to work

cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.

Id. at 360-61. That language was quoted with approval in the recent case of English v. Powell, 592 F. 2d 727 (4th Cir. 1979). In that case, the court determined that an employee of the North Carolina County Alcoholic Beverage Control Board had ignored the chain of command because he was opposed to his immediate superior. The court opined that dismissal would have been justified despite the employee's reliance on the First Amendment. As the opinion succinctly stated, "[T]here are limits to PickeringId. at 732.

Furthermore, I do not believe that Mrs. Orr has made out a case that her comments were a substantial factor in the decision to terminate her employment. It should first be noted that the majority's approach to this case places an extraordinarily difficult evidentiary burden on public employers. They are asked to prove a negative. If an employee has ever said anything remotely controversial on a topic that is conceivably of public interest, the employer must prove that the comment was not a factor leading to the dismissal.

Despite the apparent unreasonableness of this standard, the school officials in this case can establish a strong record. As a first cut, it is certainly worth noting that Mrs. Orr's criticisms of the original plan for the

Learning Center were eventually accepted in full. Despite her superiors' understandable annoyance at her decision to voice her comments at a general faculty meeting without first sharing them with her co-workers, they ultimately accepted her suggestions as meritorious. This broad-mindedness certainly tends to negate the inference that those comments were a material factor in her dismissal.

In addition, however, the Board is hardly at a loss to demonstrate other reasons for choosing not to give Mrs. Orr tenure. Mrs. Orr had received a negative review from an impartial consultant, had neglected her responsibility to maintain the branch libraries, had ignored the chain of responsibility in handling the library system's purchases, and had been found generally

disagreeable both by those who worked for her and by those to whom she reported. We can speculate that if Mrs. Orr had waxed eloquent on the visionary nature of the original plan for the Learning Resources Center her employers may have overlooked her other inadequacies: such speculation, however, does not amount to evidence. Tis a brave new world indeed where an employee's only means of obtaining absolute job security is to proclaim that his boss is stupid!

There is nothing in the record that suggests Mrs. Orr had a right to tenure. As the Supreme Court ruled in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), untenured teachers do not have any reasonable expectancy of

permanent employment. More specifically, the Fourth Circuit has held that under West Virginia tenure regulations: "[T]enure is not granted automatically, but requires positive and affirmative action" and that an untenured employee "had no property right in or legal expectancy of further employment."

Sheppard v. West Virginia Board of Regents, 516 F.2d 826, 829 (4th Cir. 1975).

I would also submit that there is nothing in the record that supports a charge that her dismissal was unfair. However, it is not the place of this Court to attempt to right all wrongs - even if we entertain some lurking suspicion that Mrs. Orr's dismissal was for other than the noblest of reasons. Once again, I cannot improve on the

language of the Supreme Court in outlining the limited scope of our inquiry: "Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for dismissal are alleged to be mistaken or unreasonable." Connick, supra, at 1690.

Mrs. Orr's record prior to her statement about the Learning Resources Center was far from exemplary. Her statements about the Center were made for personal reasons and not to advance public discourse. They were made in blatant disregard of the normal and reasonable business practice of discussing one's disagreements with one's

bosses before going over their heads. Nevertheless, her suggestions were ultimately followed. To allow her to claim that those statements are at the heart of First Amendment protection is contrary to the current state of the law. To allow her to assert that those statements were a substantial cause of her dismissal is simply an unreasonable reading of the facts of this case. Bad workers do not become better simply because they talk. I dissent.

## FOOTNOTES

1. 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

2. This is the only issue raised by the Board of Regents and it is discussed in Part IV. All other errors are assigned by the individual defendants.

3. In order to have prevailed on this point, the plaintiff had to prove that the 1974 amendment to the Board of Regents' Policy Bulletin No. 36, increasing the tenure eligibility period from five to six years, was not applicable to her. In view of our holding that she does not have a protected property interest and, therefore, was not entitled to procedural due process protection, we do not address this issue.

4. We do not accept the plaintiff's argument that because two of the librarians under her were granted faculty status as of July 1, 1974, which was the date they were first employed, this established a retroactive faculty status policy applicable to all employees. The evidence demonstrates that the discussions as to the date of faculty status for librarians had been primarily between the plaintiff and Drs. Adkins and Crowder. There was no established policy and different dates were discussed. We do not find a policy predating the discussions which would provide some type of entitlement.

5. The West Virginia Board of Regents' Revised Policy Bulletin No. 40 states, in part:

"Subject to the limitations and conditions set forth in other West Virginia Board of Regents' policy statements and Board-approved budgetary limits, the president of each college and university under the governance of the West Virginia Board of Regents has final institutional level authority and responsibility for each and every personnel action on his or her particular campus, with the exception of decisions on tenure and matters relating to his or her own employment and compensation."

6. It should be noted that the plaintiff did have her one-year terminal contract reviewed by the Board of Regents, pursuant to Amended Policy

Bulletin No. 36(9)(G), which requires the Board to review the nonretention decision to ensure that the nontenured faculty member's procedural due process and other constitutional rights were not violated. In this case, the Board ruled against the plaintiff. We also point out that W. Va. Code, 18-26-8c, which mandates a more extensive hearing process for probationary college faculty members who are not retained, was enacted in 1979 and therefore was not applicable to Mrs. Orr.

7. In addressing the last two points relating to the plaintiff's procedural due process claim, we have disposed of them based on the facts. From a legal standpoint, we are aware of cases which hold that procedural flaws in the termination of a nontenured person do not give rise to a constitutional procedural due process violation that will support a section 1983 suit. See, e.g., Kilcoyne v. Morgan, 664 F.2d 940 (4th Cir. 1981), cert. denied, 456 U.S. 928, 72 L. Ed.2d 444, 102 S. Ct. 1976 (1982); Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979); Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1 (7th Cir. 1974); but see Piacetelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981).

8. This statement was made in Pickering, 391 U.S. at 568, 20 L. Ed.2d at 817, 88 S. Ct. at 1734:

"To the extent that the Illinois Supreme Court's opinion may be read to

suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court."

While Pickering did not involve a section 1983 suit, it is clear that this statement of the law can be applied to any public employee whose employment status is adversely affected because the employee exercised his First Amendment or other constitutional rights. E.g., Connick v. Myers, U.S. , 75. L. Ed.2d 708, 103 S. Ct. 1684 (1983) (Assistant district attorney); Monsanto v. Quinn, 674 F.2d 990 (3d Cir. 1982) (Internal revenue officer); Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982) (Police officers); Egger v. Phillips, 669 F.2d 497 (7th Cir. 1982) (FBI agent).

9. This point was expressed as follows in Pickering:

"At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a

citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568, 20 L. Ed.2d at 817, 88 S. Ct. at 1734-35.

10. In the present case, the defendants do not argue that any of the Pickering restrictions on free speech are present. The only possible Pickering question is whether the plaintiff's criticism of the remodeling plans constituted matters of public concern. We believe that her criticism of the plans can properly be considered as relevant to a matter of public concern since the comments related to the design of a facility to be used by the public. See Montgomery v. Boshears, 698 F.2d 739, 743 (5th Cir. 1983) ("[P]laintiff criticized verbally and in letters to the university the appointment of her supervisor and the implementation of a library computer system. We will assume that these statements [are] . . . 'matters of public concern.'"); Vigoda v. Denver Urban Renewal Authority, 646 P.2d 900 (Colo. 1982) (en banc) (Plaintiff's criticism of construction plans for a hotel held to be protected speech). Furthermore, the fact that plaintiff's criticism was voiced at faculty staff meetings and to both Drs. Adkins and Crowder does not diminish the "public" character. Under Givhan v. Western Line Consolidated School District, 439 U.S. 410, 58 L. Ed.2d 619, 99 S. Ct. 693 (1979), statements made only to one's

superior are protected public utterances if relevant to a public matter.

11. It should also be noted that Dean Rorie's evaluation and recommendation of her advancement was for a one-year period and indicated if she could handle the increased responsibilities "she will retain her position and advance in salary and status."

12. Dr. Adkins' evaluation stated:

"At the beginning of the academic year, Mrs. Orr reported to Dr. Charles Rorie, Dean of Instruction. After February 1, 1975, Mrs. Orr reported to me. Due to a lack of some written policies, and also due to a change in leadership style with me, Mrs. Orr seemed to experience some anxiety at the outset of the change in Deans. However, Mrs. Orr has worked diligently to communicate her perception of the needs of the Learning Resources Division to me.

"During the year, the library was reclassified according to the Library of Congress model and copies of the Union Catalog are now on each campus.

"Special attention was given both the New Martinsville and Weirton Campuses in anticipation of new facilities. New positions in reader's reference librarian have been filled for the Wheeling and New Martinsville Campuses, respectively."

13. This section concluded with these remarks:

"The following general strengths of Mrs. Orr's performance are noted. It appears that she has identified and recruited well-qualified professional personnel to our institution. She worked very hard to develop detailed requests for the equipment needed in the B. & O. Building. She has followed through on Federal Grant applications for the LRC. Mrs. Orr is sincere in her requests for an increasingly larger percentage share of the institutional resources."

14. Mrs. Orr summarized this meeting in her trial testimony:

"I went to that meeting pretty well prepared to ask questions I might raise about the problems of the building, and I think about the time I started to ask questions, and many others had asked questions, Dr. Crowder rather angrily said to me, 'Jean Orr, I don't know why you are raising all these problems now. You have had plenty of chance for input,' and I said, 'Well, I am sorry, Dr. Crowder, but I have not had any,' and Dr. Adkins at the other end of the table very angrily said, 'Oh, yes, you have had plenty of input, Jean Orr, but you and Mr. Deibert have been lax in not calling your committee to meet.' I said, 'Dr. Adkins, you told me that my committee must not meet,' and he said, 'Oh, no, Mrs. Orr, you have been very lax and you and Mr. Deibert have been

lax in your responsibility in not calling the committee to meet,' and I just gave up. We went on and finished the discussion about the plans of the building."

15. The fact that her criticism of the remodeling plans resulted in changes favorable to her position cannot be taken as a defense to her First Amendment claim. To accept such a position would virtually emasculate free speech protection as the employer could accede to the criticism then later fire the employee. The teaching of Pickering and Mt. Healthy is that a public employee's employment rights are protected when free speech is properly exercised.

16. Syllabus Point 1 of Freeman states:

"In an action for wrongful injury, if one of the two counts in the declaration be good, the other bad, even though there be a demurrer to the declaration and to each count thereof, and said demurrer is improperly overruled by the trial court, a general verdict giving entire damages will be good, and does not constitute grounds for reversal by this court."

17. W. Va. Code, 56-6-26, provides:

"When there are several counts in a declaration, one or more of which are faulty, the defendant may demur to the faulty count or counts, or move the court to instruct the jury to disregard them. If he does neither, and entire

damages be found, judgment shall be entered against the defendant for the damages found, if any count be good, although others be faulty, unless the court can plainly see that the verdict could not have been found on the good count. If he demurs to the faulty count, or moves the court to instruct the jury to disregard it, and his demurrer or motion is overruled, and entire damages be found, and it cannot be seen on which count the verdict was founded, if the jury has been discharged the verdict shall be set aside, but if it is manifest that the verdict could not have been found on the bad count, the verdict shall be allowed to stand. If the jury has not been discharged, the court shall send it back with instructions to designate on which count of the declaration its verdict is found."

EXCERPT FROM TRIAL TRANSCRIPT

THE COURT: Now, you have a list of interrogatories you wanted me to submit to the jury, Mr. Cleek. The question is whether to submit these interrogatories. That is the proposed verdict form.

MR. CASSIDY: I would strongly object to the interrogatories. I think those things are all adequately covered in the instructions.

THE COURT: I am worried about that too. Let's get the verdict form down first so I can get my secretary to type it.

MR. CASSIDY: I think the instructions have been framed such they will have to make those decisions ultimately, and just the way the questions are framed they are more or less like instructions.

THE COURT: Do you object to that form of verdict?

MR. CLEEK: No, I don't guess.

(Whereupon, a discussion had had off the record and then resumed back on the record as follows:)

THE COURT: Now, David, do you really insist on these interrogatories?

MR. CLEEK: I would ask that they be made a part of the record and note my objection to not being given.

THE COURT: They can. I will just take this piece of paper right here and note --

MR. CASSIDY: I would note my objection.

THE COURT: Your objection was they were covered by the instructions?

MR. CASSIDY: Yes, and there was a possibility of confusing the jury.

(Whereupon, the following questions were lodged with the reporter to be made a part of the record:)

After the election of your foreman, you are instructed to determine the following questions. Your verdict must be unanimous. Please answer:

1. Whether the plaintiff had an understanding or agreement with defendants that her faculty status should be effective in 1971?

\_\_\_\_\_  
Yes                  No

2. If the answer to question 1 is no, then do not answer this question. If the answer to question 1 is yes, please answer the following:

(a) Whether the five (5) year rule for tenure review, in effect before July 1, 1974, should apply to plaintiff?

\_\_\_\_\_  
Yes                  No

(b) Whether the six (6) year rule for tenure review, in effect after July 1, 1974, Policy Bulletin 36, should apply to plaintiff?

Yes      No

3. Whether the grievance procedure of 3/25/76 grants a right to plaintiff for a hearing at the college on her termination.

Yes      No

4. If so, did plaintiff request to use such a procedure?

Yes      No

5. Whether the plaintiff was provided the due process through the faculty appeals committee and her appeal of her termination to the Board of Regents?

Yes      No

6. Whether plaintiff's termination was in substantial part based on her exercise of free speech?

Yes      No

7. Whether plaintiff's constitutional rights were violated?

Yes      No

8. Whether defendants knew or reasonably should have known their acts would violate plaintiff's constitutional rights or that they acted maliciously to deprive plaintiff of her constitutional rights or acted with such impermissible motive that their acts were not in good faith?

Yes      No

9. If defendants' acts were done willfully and maliciously, whether plaintiff is entitled to damages.

Yes      No

10. If the answer to question 8 is yes, are damages to be awarded against Daniel Crowder?

Yes      No

11. If answer to question 8 is yes, are damages to be awarded to plaintiff against Gregory Adkins?

Yes      No

Verdicts

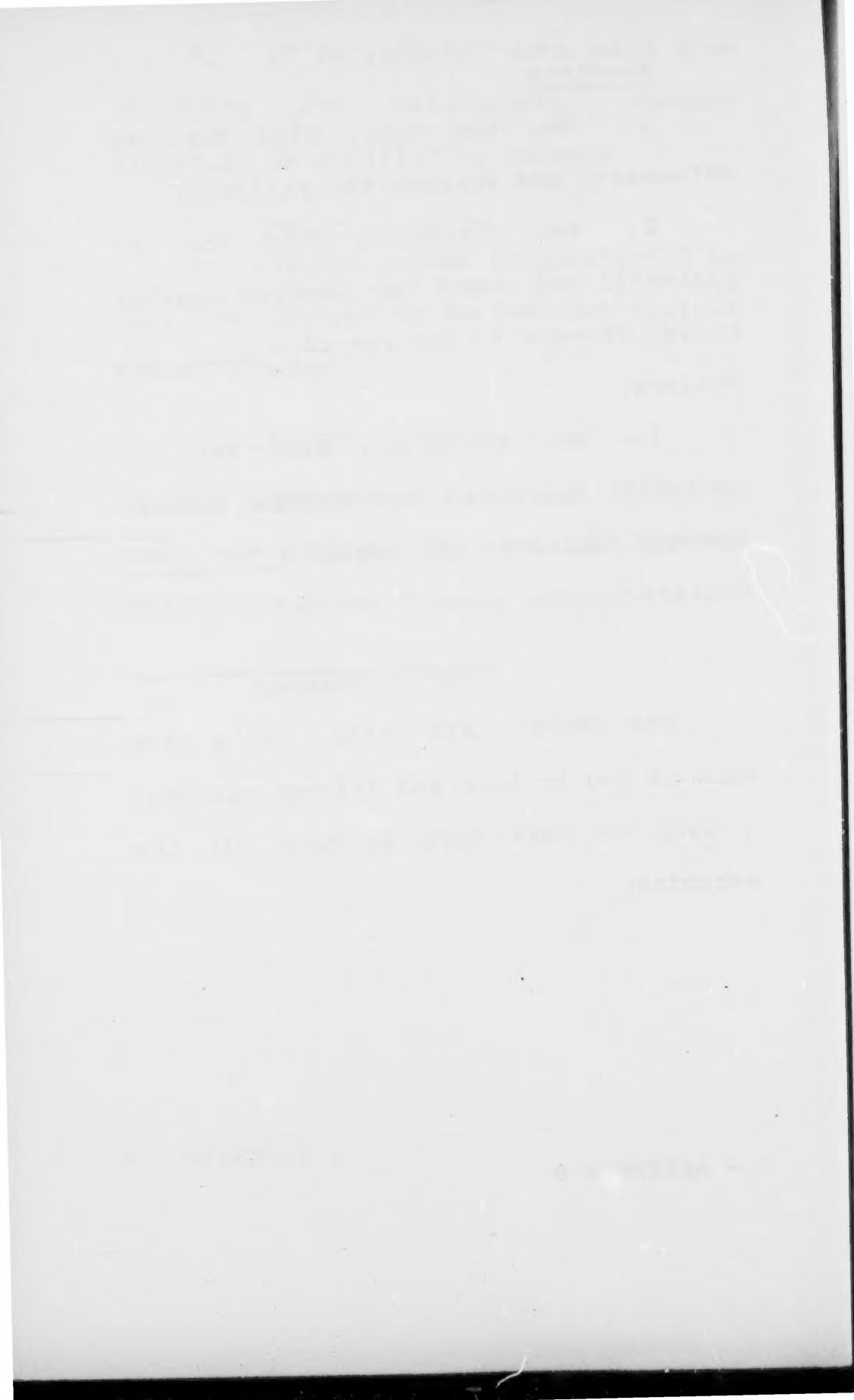
1. We, the jury, find for the defendants and against the plaintiff.

2. We, the jury, find for the plaintiff and award her damages against Daniel Crowder in the sum of \$ \_\_\_\_\_ Dollars.

3. We, the jury, find for the plaintiff and award her damages against Gregory Adkins in the sum of \$ \_\_\_\_\_ Dollars.

\_\_\_\_\_  
Foreman

THE COURT: All right, let's give each of you an hour and fifteen minutes. I want to make sure we have all the exhibits.



STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 31st day of January, 1984, the following order was made and entered, to-wit:

E. Jean Orr, Plaintiff Below, Appellee

vs. 15477

Daniel B. Crowder, individually and as President of the West Virginia Northern Community College, Gregory D. Adkins, individually and as Dean of Academic Affairs of West Virginia Northern Community College, and The West Virginia Board of Regents, a corporation, Defendants Below, Appellants

The petition for rehearing and argument filed in this action on January 17, 1984, and orally presented today, was maturely considered and a majority of the Court is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and

certified as heretofore directed.  
Justice Neely would grant. Chief  
Justice McHugh deeming himself disquali-  
fied, did not participate in the con-  
sideration of this matter.

A True Copy

Attest: /s/George W. Singleton  
Clerk Supreme Court of Appeals

SUPREME COURT OF THE UNITED STATES

No. A-811

DANIEL B. CROWDER, ETC., ET AL.,

Petitioners,

v.

E. JEAN ORR

**ORDER EXTENDING TIME TO FILE PETITION  
FOR WRIT OF CERTIORARI**

Upon Consideration of the application of counsel for petitioner(s),

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 29, 1984.

/s/ Warren E. Burger  
Chief Justice of the United States

Dated this 11th

day of April, 1984

U.S. Supreme Court, U.S.  
FILED  
OCT 12 1984  
No. 84-70  
ALEXANDER N. STEVENS  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

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DANIEL B. CROWDER, etc., et al.,  
*Petitioners,*  
v.

E. JEAN ORR,  
*Respondent.*

---

On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

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No. 84-70

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DANIEL B. CROWDER, etc., et al.,  
*Petitioners,*  
v.

E. JEAN ORR,  
*Respondent.*

---

**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit**

---

**BRIEF OF RESPONDENT IN OPPOSITION**

---

For the reasons stated herein, respondent believes that petitioners' request for a writ of certiorari should be denied.

**COUNTER-STATEMENT OF THE CASE**

The facts of this case are as stated in the decision of the Supreme Court of West Virginia. Petition App. A at 9-10; 24-33; 40-43. Petitioners' statement of facts departs significantly from that version and to this extent is not a reliable indicator of the state of the record.

**SUMMARY OF ARGUMENT**

Petitioners assert two questions in connection with the First Amendment claim. First, they contend that the holding that the criticism of the proposed plan for the new library facility constituted a matter of public concern conflicts with this Court's decision in *Connick v. Myers*, — U.S. —, 103 S.Ct. 1684 (1983). Unlike

*Connick*, however, the comments at issue were in no sense a personal grievance regarding working conditions, and respondent was not complaining about inconvenience to herself, but was seeking to protect the interests of the public; there simply is no conflict here. Second, petitioners question whether persistent efforts to obtain retroactive faculty status constitute a matter of public concern. However, this issue is not presented by this case, as the Court below did not decide it or even discuss it.

In their third "question presented" petitioners contend that they were denied due process of law because the court below overruled prior precedent on which they relied. The court below ruled that it was *not* overruling prior precedent, and this Court could reach petitioners' third question only by overturning the West Virginia Supreme Court's construction of state law. Moreover, even were this Court to undertake its own determination of the meaning of prior West Virginia law and even were it to conclude that the lower court misconstrued its own law, there still would not be a due process violation in these circumstances. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680, 682 n.8 (1930).

Finally, petitioners' contention that the West Virginia Supreme Court erred in applying its "two issue" rule to a federal cause of action—because that rule is "outcome determinative in a systematic manner"—is wrong (assuming, as we doubt, that this would render its use improper). Petitioners could have obtained the same result as would follow from the federal rule regarding general jury verdicts simply by requesting a special verdict. Because that is what defendants in states applying the "two issue" rule do routinely, petitioners can not cite a single case in which the propriety of applying the "two-issue" rule to federal claims brought in state courts has ever been addressed. The question thus is of no practical significance.

**ARGUMENT**

1. Petitioners first "question presented" is whether Orr's criticism of the proposed plans for a new library facility constituted protected speech on a matter of public concern. Petition at i. Petitioners contend that the West Virginia Supreme Court's holding that Orr's criticism of the library plans was a matter of public concern conflicts with this Court's decision in *Connick v. Myers*, — U.S. —, 103 S.Ct. 1684 (1983).

Contrary to Petitioners' argument, the holding that Orr's criticism of the proposed design for the library facility was a matter of public concern, in no way conflicts with *Connick*, and is in full accord with this Court's decisions. *Connick* involved the discharge of a public employee for circulating to her coworkers a questionnaire regarding a number of internal office matters. She did so on the heels of a proposal by one of her superiors to transfer her; she strongly opposed the transfer. This Court found that in these circumstances virtually all of the employee's speech amounted to a personal grievance over internal office policy. It held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, a federal court is not the appropriate forum in which to review the wisdom of a decision taken by a public agency allegedly in reaction to the employee's behavior." Although this Court upheld the discharge in *Connick*, it made clear that the balance it struck did not diminish the right of a public employee to speak out on matters of public concern. Its decision reaffirmed the principles of *Pickering v. Board of Education*, 391 U.S. 563 (1963), on this score.

In the instant case the West Virginia Supreme Court found that Orr's criticism of the library plans constituted a matter of public concern because it involved "the design of a facility to be used by the public." Petition App.

A at 84 n.10. It cited Orr's "basic criticism" of the design:

that the library was laid out so that most of the main student traffic in travelling to and from class rooms would pass through the library. This would have disrupted the library patrons and would have provided little security for the library collection.

Petition App. A at 30. These concerns are a far cry from the personal concerns that prompted the employee's speech in *Connick*: the subject of the speech here is not the personal grievance of an employee about her working conditions, as it was in *Connick*. Orr was not complaining about inconvenience to herself, but about the interests of the public—the disruption that would result to the library's patrons and the threat to the security of the library collection.

Finally, the lower court correctly found that "the fact that Orr's criticism was voiced at faculty staff meetings and to [her superiors, did] not diminish the 'public' character [of the criticism]." *Id.* at 84 n.10. See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).<sup>1</sup>

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<sup>1</sup> Petitioners contend that "the record is sufficient to conclude" that respondent was denied tenure not because of *what* she said, but because she violated "protocol" in the *manner* in which she said it. Petition at i, 31. But the holding of the court below is simply that the record is sufficient to support a jury finding that Orr was denied tenure because of *what* she said. The court below did not hold that the First Amendment would have precluded adverse action had the action been taken because of a violation of protocol. Accordingly, that question is not presented here.

For the same reason, petitioners are wrong in suggesting that this case presents a vehicle to clarify whether adverse actions by an employer motivated by criticism, but based on legitimate factors other than the content of the criticism, are permissible. Petition at 31. This is a case in which it has been found that the employee suffered adverse action because of the *content* of the criticism, not factors other than that content. Petition App. A at 84 n. 10; 30; 41; 42; 43; 87 n. 15.

2. Petitioners' second "question presented" asks whether Orr's "persistent efforts to convince her superiors that she ought to be granted retroactive faculty-status constituted speech relating to a matter of public concern so as to be an impermissible basis on which to terminate her employment, where such termination was based in part on a continuing pattern of unresponsiveness to her superiors. . . ." Petition at i-ii. That question, however, is not presented in this case. The West Virginia Supreme Court did not hold that "persistent efforts to convince . . . superiors [to grant] retroactive faculty-status" are an impermissible basis on which to terminate employment. It held only that Orr's criticism of the library plans was an impermissible basis. Indeed, the West Virginia Supreme Court understood the criticism of library plans to be the only First Amendment claim that had been submitted to the jury (Petition App. A at 9); and petitioners' own briefs to that court identified the library plans criticism as the only First Amendment claim considered by the jury.<sup>2</sup>

3. In their third "question presented" petitioners allege that the court below denied them due process of law because it "*sua sponte* overrul[ed] state procedural law and retroactively appli[ed] a requirement that trial counsel must request a separate verdict on each count . . . where . . . counsel, relying on the law in effect at the time of trial, did not so request and would have prevailed on appeal but for the retroactive application of the new rule." Petition at ii-iii. They argue that this Court should intervene because "[r]etroactive application of the

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<sup>2</sup> The court cited Orr's request for retroactive faculty status only for the light it shed on petitioners' state of mind respecting Orr's criticism of the library plans. The court found it significant, for example, that the first written notice Orr received regarding her request came shortly after a meeting where she criticized the plans and that, while petitioners gave retroactive faculty status to two other librarians in December 1975, they withheld their decision on her status. Petition App. A at 42-43.

'two-issue' rule deprived them of property without due process of law, was contrary to *Brinckerhoff (sic.)-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673 (1930), and was . . . arbitrary." *Id.* at 38.

The West Virginia Supreme Court did not consider its decision on the "two issue" rule in this case to be a departure from prior law—"adoption of the rule permitting a general verdict to be sustained if supported by one good theory is not inconsistent with . . . prior law," Petition App. A at 50)—and the dissent below did not dispute the decision in this regard. Nevertheless, petitioners dispute that reading of West Virginia law, and that dispute is the predicate for the federal claim presented in their third "question presented". Whatever the merit of this dispute, however, a state court's construction of prior state law is not an appropriate subject for this Court's review. Yet only by overturning the state supreme court's construction of prior state law could this Court even reach the question that petitioners present.

Even were this Court to undertake an independent construction of prior West Virginia law, and even were it to disagree with the West Virginia Supreme Court about the meaning of prior West Virginia law, the third "question presented" would be frivolous. *Brinkerhoff-Faris*, upon which petitioners place their principal reliance, held *only* that the state courts cannot deny a litigant "due process in the primary sense"—"an opportunity to present its case and be heard in its support." 281 U.S. at 681. In that case the plaintiff sued to obtain an injunction against the collection of an allegedly discriminatory tax assessment. The state supreme court—without ruling on the plaintiff's discrimination claim—affirmed the dismissal of plaintiff's request on the ground that the plaintiff had an adequate legal remedy with the state tax commission. Prior to this ruling, however, that same court had held unequivocally that the state tax commission had no power to grant the relief plaintiff

sought, and the plaintiff, therefore, could not initially have pursued this option. By the time the supreme court reversed its prior holding, the plaintiff was time-barred from doing so. Thus, “[t]he state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because . . . the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it.” 281 U.S. at 679. The only due process violation found in *Brinkerhoff-Faris* was that the state had deprived the plaintiff of any opportunity whatever to be heard.

Contrary to petitioners' assertion, the application of the “two-issue” rule in the instant case is not contrary to *Brinkerhoff-Faris*—even on the hypothesis that the adoption of that rule departed from prior West Virginia law. Petitioners were accorded the opportunity to present their case and to be heard in the courts of West Virginia. And they were free to request at the trial that separate verdicts be entered on each claim. Had such a request been made and denied, it would have been reversible error as a matter of state law. Petitioners' only point is that they did not avail themselves of an opportunity that was available to them—because they relied on prior precedent that indicated there was no need to do so. That contention, even were it correct, would not amount to a due process violation. As *Brinkerhoff-Faris* itself expressly stated: “the courts of a state have the supreme power to interpret and declare . . . the laws of the state,” 281 U.S. at 680, and

the mere fact . . . a state has . . . overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment.

*Id.* See also *id.* at 682 n. 8 (“State Courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guarantees, even though the

parties may have acted to their prejudice on the faith of the earlier decisions") (citing cases). Thus, even if the West Virginia court had overruled prior law, the situation would be no different from the many instances in which this Court has overturned prior precedent and yet, although leaving room for non-retroactive application in *other* cases, has found it proper to apply the new rule to the case in which the new rule was announced. See, e.g., *Stovall v. Denno*, 388 U.S. 293, 301 (1967); *Desist v. United States*, 394 U.S. 244, 254-55 n.24 (1969).

4. Petitioners' fourth "question presented" is whether the federal rule regarding general jury verdicts "should be applied to a 42 U.S.C. § 1983 action prosecuted in state court where the contrary state rule is outcome determinative in a systematic manner." Petition at iii. But West Virginia's "two issue" rule is *not* "outcome determinative in a systematic manner"—assuming, as we doubt, that that would render its use improper. As the decision below explains, the defendant in a multiple-count case brought in the West Virginia state courts has the right upon demand to separate verdicts on each count (Petition App. A at 49). That right, when invoked, provides the defendant the same protection as the federal rule regarding general jury verdicts. Defendants in states applying the "two issue" rule routinely demand separate verdicts to assure that they will have this protection. That is why petitioners are unable to cite a single case in which the propriety of applying the "two issue" rule to federal claims brought in state court has ever been addressed. The question thus is of no practical significance.

### CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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